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Hearing Date: November 3, 2015
Hearing Time: 9:45 A.M.

Counsel for Keen-Summit Capital Partners LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re:

Chapter 7

ORGANIC AVENUE LLC,

Case No. 15-12787 (REG)

Debtor.

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**AFFIRMATION OF HAROLD J. BORDWIN IN SUPPORT
OF THE TRUSTEE'S APPLICATION TO RETAIN AND EMPLOY
KEEN-SUMMIT CAPITAL PARTNERS LLC AS MARKETING AND SALES AGENT**

HAROLD J. BORDWIN hereby submits this *Affirmation*, and declares as follows:

1. This Affirmation is submitted (a) in support of (i) the *Trustee's Application for Authority to Retain and Employ Keen-Summit Capital Partners LLC as Marketing and Sales Agent for the Estate's Real Property Leases and Intellectual Property*, filed on October 29, 2015 (Docket No. 19) (the "**Application**") on behalf of Jil Mazer-Marino as Chapter 7 trustee (the "**Trustee**"), and (ii) the *Application, with Supporting Declaration, for Entry of an Order Shortening time for Notice with Respect to Trustee's Application for Authority to Retain and Employ Keen-Summit Capital Partners LLC to as Marketing and Sales Agent for the Estate's Real Property Leases and Intellectual Property*, filed on October 29, 2015 (Docket No. 20) (the "**Application to Shorten Time**"), and (b) in response to the *United States Trustee's Limited Objection to Trustee's Application for Authority to Retain and Employ Keen-Summit Capital*

Partners LLC to as Marketing and Sales Agent for the Estate's Real Property Leases and Intellectual Property, filed on November 2, 2015 (Docket No. 29) (the “**UST Objection**”).

BACKGROUND

2. I am a Principal and Managing Director of Keen-Summit Capital Partners LLC (“**Keen-Summit**”), which is located at 10 East 53rd Street, 28th Floor, New York, New York 10022-5244. I have been employed by Keen-Summit since its formation on January 1, 2015, and by one or another of its predecessor firms since 1988, 27 years ago.

3. I respectfully refer the Court to the Application, my *Affidavit of Disinterestedness* attached thereto, the proposed *Retention Agreement* between the Trustee and Keen-Summit dated October 26, 2015 (the “**Retention Agreement**”), also attached thereto, as well as the Application to Shorten Time, for the relevant facts applicable to the proposed retention of Keen-Summit on behalf of the Trustee in this case.

SUMMARY OF DISPUTE

4. Keen-Summit is a broker. As a broker, we have negotiated with the Trustee a purely contingent fee arrangement: five percent (5%). Section 328(a) clearly authorizes the Trustee to engage us on a “percentage fee basis or on a contingent fee basis.”¹ Section 328(a), in the very next sentence establishes the standard of review for such fees as being modifiable by the Court “after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.”

5. Notwithstanding the Trustee's and Keen-Summit's agreement to proceed on this basis, consistent with the Bankruptcy Code and precedent (as described below), the Office of the

¹ Our brokerage fee, like all brokerage fees, is both: it's a percentage-based fee that is wholly contingent upon success.

United States Trustee (the “**UST**”) objects to a pure Section 328(a) retention and compensation structure, insisting on maintaining rights of review of compensation under section 330.

6. Keen-Summit and its predecessors, through which my father, my brother and I have conducted our well-known real estate and distress consulting business for generations (collectively, “**Keen**”), have spent decades contesting this very issue. Both times that it has been raised in the context of an engagement for brokerage services, the judges of this Court have ruled that the UST is **not** entitled, after the fact, to review our compensation for reasonableness.

SECTIONS 328 AND 330

7. Section 328(a) of the Bankruptcy Code, by its express terms, governs professionals who are engaged on a “percentage fee basis, or on a contingent fee basis.” It provides:

The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or *percentage fee basis, or on a contingent fee basis*. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(Emphasis added.)

8. The key of a section 328(a) retention is that the fixed fee or contingency agreement is set at the beginning of the engagement and is reviewable only on an “improvident” standard, rather than a traditional, retrospective, standard of “reasonableness” which applies to hourly retention agreements, as set forth in section 330(a).²

² Section 330(a) provides:

9. The fact that the Trustee is seeking to engage Keen-Summit on a “percentage fee basis or on a contingent fee basis” is not contested.

10. The fact that an engagement on a “percentage fee basis or on a contingent fee basis” is governed by Section 328(a) of the Bankruptcy Code is not contested.

11. The fact that the Trustee and Keen-Summit have negotiated a five percent (5%) commission is not contested.

12. It is my understanding that the only contested issue in Keen-Summit’s retention is whether the UST should have the right, after the fact, to question the reasonableness of a brokerage commission. Such a position flies in the face of common sense and completely undermines the concept of a contingency fee arrangement. It is Keen-Summit’s position, with

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 - (A) ***reasonable compensation for actual, necessary services rendered*** by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested. (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, ***the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors***, including - (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title....

(Emphasis added.)

which the Trustee agrees,³ that Keen-Summit, as a broker working for a commission, should be able to work on a contingency fee arrangement and not be second-guessed after the completion of the project. The UST's position, that it is entitled to a retrospective "reasonableness" review of a commission is both (i) in derogation of the explicit terms of section 328(a), and (ii) inconsistent with industry practice. Under the plain meaning and explicit terms of section 328, once Keen-Summit is retained on a "percentage fee basis or on a contingent fee basis," the fee is reviewed under the section 328, not 330, standard.

THE FIXED PERCENTAGE AGREEMENT

13. As set forth in the Application and the Retention Agreement, Keen-Summit is to be retained to market and sell the estate's assets (leases, intellectual property, and, if sold as part of a turn-key sale, the machinery and equipment) for 5% of gross proceeds plus reimbursement of approved out-of-pocket expenses.⁴ This fee arrangement was negotiated in good-faith, at arms-length, and, I submit, reflects competitive market terms.

SECTION 328 IS THE CORRECT STANDARD TO GOVERN COMPENSATION OF A CONTINGENCY FEE SALES AGENT

14. The difference between section 328 and section 330 engagements has been a feature of modern bankruptcy law since the enactment of the Bankruptcy Code. "In 1978, Congress amended the Bankruptcy Code in part to make it easier for debtors in bankruptcy to retain professionals for discrete matters." *Riker, Danzig, Scherer, Hyland & Peretti v. Official Committee of Unsecured Creditors (In re Smart World Technologies, LLC)*, 552 F.3d 228, 232

³ Keen-Summit understands that while the Trustee is satisfied with the terms of the engagement as set forth in the Retention Agreement, including the retention under section 328, this is not the estate's cause to pursue, but ours.

⁴ Keen-Summit understands that its compensation is subject to a final fee application (or other fee review process) and that in its final fee application it will describe Keen-Summit's activities (without time records), the calculation of its fees and a recitation of out-of-pocket expenses. Keen-Summit acknowledges that the Court has ultimate authority to allow or disallow (including to cause to disgorge) fees and expenses paid by the estate.

(2d Cir. 2009), *citing, inter alia*, COLLIER ON BANKRUPTCY, para. 328.02 (Alan N. Resnick and Henry J. Sommer, eds., 15th Ed, rev.). Collier explains:

Section 328(a) effects a significant departure from prior practice under the Bankruptcy Act in which professionals were entitled to reasonable compensation determined on a strictly *quantum meruit* basis. Section 328(a) thus provides a mechanism to cement definite compensation terms at the beginning of a professional's engagement, and thereby "eliminate the previous uncertainty associated with professional compensation in bankruptcy proceedings, even at the risk of underpaying, or, conversely, providing a windfall to, professionals retained by the estate."

Under section 328(a), professional persons may be employed pursuant to prearranged terms of compensation as approved by the court. ...

15. In *In re Northwest Airlines Corp.*, 382 B.R. 632 (Bankr. S.D.N.Y 2008), Judge Morris considered the request for a success fee in the context of a section 328 retention of a financial advisory firm to a committee which was specifically retained under a section 328 standard of review of its fee:

Under Section 328(a), professionals ... may obtain pre-approval of their compensation arrangements from the Court. The "pre-approval" affords the professional assurances the amount of compensation approved will not be modified by the Court unless it is proven that the amount was "improvident in light [of] developments not capable of being anticipated at the time."

Northwest, 382 B.R. at 639 (citation omitted).⁵ The Court directed:

If a professional wishes its compensation package, including professional success or completion components, to receive Section 328(a) review at the time of their final application for compensation, the elements under which the final compensation will be awarded must be revealed in the professional's retention application.

⁵ The Court went on to discuss whether the fee requests before the Court were within the section 328 standard of review and determined that (a) while the monthly fee of a particular advisory firm was within the section 328 term, a request for an enhancement over the contractual engagement would be viewed under section 330, and (b) the request of another firm was not a section 328 retention from the beginning.

Northwest, 382 B.R. at 643. That is exactly what we are doing here.

16. We understand further that once a fixed-fee arrangement is properly approved at the retention stage, it is expected to be enforced later on under a section 328, not 330, standard. In *Smart World*, the Court of Appeals for the Second Circuit considered whether a retention order was clear that the professional retention was under section 328 and then, determining that it was, considered the contingency fee fixed under the retention order, and not reviewable later under section 330. *Smart World*, 552 F.3d at 232-34. See also, e.g., *Lazard Freres & Co. v. Northwestern Corp. (In re Northwestern Corp.)*, 344 B.R. 40, 43 (D. Del. 2006) (financial advisor to a committee retained on a fixed fee basis under section 328 would not be subject to reduction of its fee under section 330), citing, *inter alia*, *Committee of Equity Security Holders v. Official Committee of Unsecured Creditors (In re Fed. Mogul-Global, Inc.)*, 348 F.3d 390 (3d Cir. 2003).⁶ That is exactly the intention here, to fix a contingency fee up front and not renegotiate it later.

KEEN-SUMMIT SECTION 328 RETENTIONS

17. In the instances where:

- (i) the UST has objected to Keen's retention on the basis that the UST has sought to maintain the right, after the fact, to assess the reasonableness of Keen's commission, and
- (ii) the Bankruptcy Court was asked to rule on that issue,

the Bankruptcy Courts in this District have ruled that Keen's brokerage commission was not subject to after-the-fact reasonableness review by the UST, as follows.⁷

⁶ We note that many of the cases and orders to which the UST Objection points involve investment bankers or advisors seeking monthly, periodic or success fees, not brokers retained under percentage fee arrangements.

⁷ It is frustrating, confusing and expensive to us and our clients and their estates to re-litigate the same issue over and over in the same Court over twenty years.

In re Accessory Place, Inc.:

18. In the *Accessory Place* bankruptcy proceeding, in March 1996, almost twenty years ago, the debtor sought to retain Keen as its broker and to compensate Keen on a contingency basis. The UST objected, seeking to require time records in a contingency arrangement as it would with a section 330 retention, in order to retrospectively assess the reasonableness of Keen's contingency fee. Judge Garrity ruled that in a contingency fee retention, Keen need not keep time records as would a professional retained under a section 330 standard. An excerpt of the transcript is attached as **Exhibit A**. Pages 3 to 26 recount the exchange on the record, portions of which follow:

UST:⁸ Our objection is on three points....

UST: ... At this time there are so many contingencies out there, it is impossible at this time for any parties in interest to determine the reasonableness of the fees requested.

THE COURT: **Isn't this just a contingent fee arrangement ...** They are basically saying, look, we are willing to do this for a percentage of what it is what is realized in these transactions. We are proposing, we do this all the time. We think we know how to do it better than anybody else and we just want to do it on a percentage basis.

UST: That's correct. Except for the fact that by looking at the applicant's own letter of engagement, I think they can themselves concede of instances where a fee calculated on a percentage basis might be unreasonable...

THE COURT: *Is that fair, will all due respect, is it fair then to say heads I win, tails you lose?*

THE COURT:⁹ ... I respectfully disagree with the U.S. Trustee that Keen ought to be required to comply with our guidelines or the

⁸ The attorney representing the UST is identified in the attached transcript.

guidelines of the U.S. Trustee. Although we find those to be very, very helpful on assisting the court in its analysis of fee applications, I think the benefit of those guidelines is more significant when you are dealing with the more traditional professional, that being an accountant or an attorney. Here Keen is being retained to undertake a marketing program of all the leases and what is being retained here is Keen's expertise in that regard, something that is not necessarily easily translatable into time spent with respect to any particular lease. ...

(Emphasis added.) Keen was retained on a fixed-contingency basis without the requirement of keeping time records.

In re Jennifer Convertibles, Inc.:

19. In the *Jennifer Convertibles* bankruptcy proceeding, in August 2010, the issue of review under section 328(a) or 330 was raised and Judge Gropper determined that section 328 was the correct standard of compliance for and review of Keen's commissions. An excerpt of the transcript is attached as **Exhibit B**. Pages 12 to 15 recount the exchange on the record, portions of which follow:

COUNSEL:¹⁰ The issue is –

THE COURT: That your fees should be subject to reasonableness standards?

COUNSEL: Yes, that's right. Your Honor, I would say that KPMG CF often gets 328 review as a real estate consultant. And there is a – their formula for fees is exactly what's contemplated under Section 328 of the Bankruptcy Code....

THE COURT: ***It's a contingency.***

COUNSEL: -- correct.

THE COURT: All right.

COUNSEL: ***And I believe that's what 328 specifically goes –***

THE COURT: So what has to be retained then? What has to go to Washington for further review?

⁹ At page 22 of the transcript.

¹⁰ Keen's practice at the time was within KPMG Corporate Finance, referred to on this record as KPMG CF. KPMG CF's counsel is identified in the attached transcript.

UST:¹¹ Oh, nothing, Your Honor. The United States Trustee simply desires a breakdown and her rights under Section 330 to review each of those transactions and the fees derived therefrom.

THE COURT: Don't you have anything better to do? *Of course you can review each of those transactions to see if they've satisfied the contingency. What's the issue, then? What we're doing is we're setting the contingency. Is that correct?*

COUNSEL: *That's correct, Your Honor.*

THE COURT: *Fine. You can review each transaction. It either satisfies the contingency or it doesn't. But we're not going [to] say well, this contingency should have been a little bit lower because the amount is a little higher. 328 still has a savings clause in the event of truly unforeseen circumstances. The Second Circuit has allowed a very, very, narrow exception to that.* So what's the issue?

UST: If that's your ruling, Your Honor, we're perfectly fine in agreeing with it.

THE COURT: All right. That's my ruling...

(Emphasis added.) Keen-Summit was retained as broker subject to section 328 review, not section 330. The Order is attached together with the transcript excerpt as **Exhibit B**.

20. Moreover, Keen has been retained under section 328 orders many times in this District, in sister districts, and across the country.¹² Keen-Summit respectfully attaches and brings to the attention of the Court a sampling of orders entered on its behalf as real estate consultant, business broker and/or investment banker, *each of which is a section 328 retention with pre-approved compensation*, as follows:

2014, SDNY: *Order Authorizing Employment and retention of GA Keen Realty Advisors, LLC as Special Real Estate Advisor to the Chapter 7 Trustee*, May 30, 2014, *In re Barbara Zeifer*, Case No. 13-12228 (MG) (Martin Glen, J.) in the United States Bankruptcy Court for the Southern District of New York . . . **Exhibit C**

2005, SDNY: *Order Under 11 U.S.C. §327(a) and §328(a) Fed. R. Bankr. P. 2014 and S.D.N.Y. LBR 2014-1 Authorizing Retention*

¹¹ The attorney representing the UST is identified in the attached transcript.

¹² This is not to say that Keen has not agreed in certain cases or been required in certain circumstances to adhere to a section 330 standard.

*of Keen Realty LLC as Special Real Estate Consultant, March 23, 2005, In re The Perfect Picture Corp., Case No. 05-11563 (SMB) (Stuart M. Bernstein, J.) in the United States Bankruptcy Court for the Southern District of New York . . . **Exhibit D***

*2015, NDNY: Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors, July 31, 2015, In re Nirvana, Inc., Case No. 15-60823 (Diane Davis, J.) in the United States Bankruptcy Court for the Northern District of New York . . . **Exhibit E***

*2015, NJ: Order Authorizing Retention of Keen-Summit Capital Partners, LLC as an Advisor to the Chapter 11 Trustee, June 10, 2015, In re Bayway Hand Car Wash Corp., Case No. 13-32632 (MBK) (Michael B. Kaplan, J.) in the United States Bankruptcy Court for the District of New Jersey . . . **Exhibit F***

*2015, SC: Order Authorizing Employment of Keen-Summit Capital Partners LLC as Real Estate Advisor for the Debtor, Effective February 26, 2015, and Approving Payment of Fees to Keen-Summit, March 11, 2015, In re Briar's Creek Golf, LLC, Case No. 15-00712 (John E. Waltes, J.) in the United States Bankruptcy Court for the District of South Carolina . . . **Exhibit G***

*2015, CD CA: Order Granting Debtor's Application to Employ GA Keen Realty Advisors, LLC as Real Estate Broker, January 23, 2015, In re Sarkis Investments Company, LLC, Case No. 2:13-bk-29180-RK (Robert Kwan, J.) in the United States Bankruptcy Court for the Central District of California . . . **Exhibit H***

*2014, SD TX: Agreed Order Authorizing the Employment of GA Keen Realty Advisors, LLC, as Investment Banker for the Debtor, Pursuant to §§105(a), 327(a) and 328(a) of the Bankruptcy Code, December 18, 2014, In re Aziz Convenience Stores, L.L.C., Case No. 14-70427 (Richard S. Schmidt, J.) in the United States Bankruptcy Court for the Southern District of Texas . . . **Exhibit I***

*2014, DE: Order Authorizing the Retention and Employment of GA Keen Realty Advisors, LLC as Real Estate Advisor to the Debtors Nunc Pro Tunc to the Date of the Retention Agreement, June 12, 2014, In re Coldwater Creek Inc., Case No. 14-10867 (BLS) (Brendan L. Shannon, J.), in the United States Bankruptcy Court for the District of Delaware . . . **Exhibit J***

THE UST OBJECTION

21. The UST Objection says the burden is on us to show the terms of the retention are appropriate. Whether or not that burden is accurate, the Trustee in her Application (including my attached *Affidavit of Disinterestedness*) provides clear evidence to show why she needs a broker, why Keen-Summit is appropriate for this debtor's estate, and why the terms are appropriate and in the best interests of the estate. Both the Trustee and Keen-Summit recognize that Keen-Summit is taking on considerable risk in working without a retainer on a wholly contingent basis and by advancing expenses for the benefit of the debtor's estate. We, Keen-Summit, have agreed to take on this risk in return for the potential upside of a 5% commission. By its very terms, this is the precise circumstance that section 328(a) was intended to address. The UST Objection asks us to take on these risks without any certainty as to our commission. The UST's position is contrary to the plain language of section 328(a) and ignores this Court's rulings on this issue.

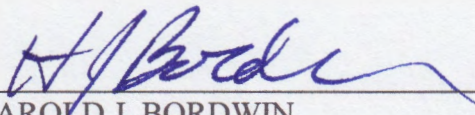
CONCLUSION

22. Keen-Summit finds itself in a "Groundhog Day" mode, having to approach this legal issue over and over again in cases in this District. Judge Garrity and Judge Gropper's rulings on this issue are clear. Nevertheless, Keen-Summit finds itself in a position where it is expected to be subject to "heads I win, tails you lose." We are a broker working for a commission. Section 328(a) addresses this form of engagement and specifies the precise standard of review. There is no way to read section 328 to include a reservation to review compensation under section 330 and the UST has provided no statutory authority to do so.

23. Keen-Summit respectfully seeks an Order authorizing its retention as set forth in the Retention Agreement and in the Trustee's Application, directing a standard for its compensation for its fixed-percentage services based on section 328(a), not section 330.

24. I declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated: New York, New York
November 2, 2015



HAROLD J. BORDWIN

INDEX TO EXHIBITS

- A Transcript (excerpt), *In re Accessory Place*, Hearing on March 5, 1996, Case No. 96-40850 (JLG) (James L. Garrity, J.)
- B Transcript (excerpt), *In re Jennifer Convertibles Inc.*, Hearing on August 10, 2010, Case No. 10-13779 (ALG) (Allan L. Gropper, J.), and *Order Authorizing Employment and Retention of KPMG CF Realty LLC, as Special Real Estate Advisor for the Debtors Nunc Pro Tunc to the Petition Date*, August 10, 2010
- C *Order Authorizing Employment and retention of GA Keen Realty Advisors, LLC as Special Real Estate Advisor to the Chapter 7 Trustee*, May 30, 2014, *In re Barbara Zeifer*, Case No. 13-12228 (MG) (Martin Glen, J.) in the United States Bankruptcy Court for the Southern District of New York
- D *Order Under 11 U.S.C. §327(a) and §328(a) Fed. R. Bankr. P. 2014 and S.D.N.Y. LBR 2014-1 Authorizing Retention of Keen Realty LLC as Special Real Estate Consultant*, March 23, 2005, *In re The Perfect Picture Corp.*, Case No. 05-11563 (SMB) (Stuart M. Bernstein, J.) in the United States Bankruptcy Court for the Southern District of New York
- E *Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors*, July 31, 2015, *In re Nirvana, Inc.*, Case No. 15-60823 (Diane Davis, J.) in the United States Bankruptcy Court for the Northern District of New York
- F *Order Authorizing Retention of Keen-Summit Capital Partners, LLC as an Advisor to the Chapter 11 Trustee*, June 10, 2015, *In re Bayway Hand Car Wash Corp.*, Case No. 13-32632 (MBK) (Michael B. Kaplan, J.) in the United States Bankruptcy Court for the District of New Jersey
- G *Order Authorizing Employment of Keen-Summit Capital Partners LLC as Real Estate Advisor for the Debtor, Effective February 26, 2015, and Approving Payment of Fees to Keen-Summit*, March 11, 2015, *In re Briar's Creek Golf, LLC*, Case No. 15-00712 (John E. Waltes, J.) in the

United States Bankruptcy Court for the District of South
Carolina

- H *Order Granting Debtor's Application to Employ GA Keen Realty Advisors, LLC as Real Estate Broker*, January 23, 2015, *In re Sarkis Investments Company, LLC*, Case No. 2:13-bk-29180-RK (Robert Kwan, J.) in the United States Bankruptcy Court for the Central District of California
- I *Agreed Order Authorizing the Employment of GA Keen Realty Advisors, LLC, as Investment Banker for the Debtor, Pursuant to §§105(a), 327(a) and 328(a) of the Bankruptcy Code*, December 18, 2014, *In re Aziz Convenience Stores, L.L.C.*, Case No. 14-70427 (Richard S. Schmidt, J.) in the United States Bankruptcy Court for the Southern District of Texas
- J *Order Authorizing the Retention and Employment of GA Keen Realty Advisors, LLC as Real Estate Advisor to the Debtors Nunc Pro Tunc to the Date of the Retention Agreement*, June 12, 2014, *In re Coldwater Creek Inc.*, Case No. 14-10867 (BLS) (Brendan L. Shannon, J.), in the United States Bankruptcy Court for the District of Delaware

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EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

MAR 18 1996

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In the Matter

of

ACCESSORY PLACE, INC.,

96-40850

Debtor
-----x

U.S. Bankruptcy Court
Alexander Hamilton Custom House
New York, N.Y. 10004-1408
March 5, 1996 - 10:30 a.m.

Before:

HON. JAMES L. GARRITY,
Bankruptcy Judge

HEARING ON OBJECTION TO RETENTION OF KEEN
REALTY; HEARING ON APPLICATION OF DEBTOR TO
CONDUCT AUCTION

Appearances:

MESSRS. SCHULTE, ROTH & ZABEL

Attorneys for Debtor

By: JAMES PECK, Esq.

KIRK BRETT, Esq.

MELANIE STRASSBERG, Esq.

Attorney for U.S. Trustee's Office

GERALD I. METZ, C.S.R.
Official Court Reporter -
212-969-0861
914-427-7474

1 Accessory Place, Inc.

2 A p p e a r a n c e s : (Continued)

3

4 Messrs. EATON & VAN WINKLE

5 Attorneys or DeBARTOLO PROPERTIES
6 MANGEMENT, INC.

7 By: ROBERT W. DREMLUK, Esq.

8

9 Messrs. ZALKIN, RODIN & GOODMAN, LLP

10 Attorneys for ROYAL HAWAIIAN

11 By: JAY TEITELBAUM, Esq.

12

13 Messrs. PARKER DURYEE ROSOFF & HAFT

14 Attorneys for EMIGRANT SAVINGS BANK

15 By: WILLIAM M. RIFKIN, Esq.

16

17 Messrs. BERKMAN, HENOCH, PETERSON & PEDDY, P.C.

18 Attorneys for CORPORATE PROPERTY
19 INVESTORS

20 By: DOUGLAS E. SPELFOGEL, Esq.

21

22 Present:

23 HAROLD J. BORDWIN

24 Vice President

25 Keen Realty Consultants, Inc.

1 Accessory Place, Inc.

2 MR. PECK: Good morning, your
3 Honor. James Peck, counsel for the debtor,
4 Accessory Place, Inc. There are two matters
5 scheduled this morning and I would propose to
6 take them in reverse order from the order in
7 which they appear on the calendar.

8 THE COURT: That would be fine.

9 MR. PECK: The two matters are a
10 contested application for retention of Keen
11 Realty Consultants. It is contested as a
12 result of an objection that we received by the
13 office of the U.S. Trustee. That application
14 relates to the second matter, which is an
15 application for the authorization of auction
16 procedures and bidding procedures in connection
17 with the leasehold interests of the debtor.
18 Because that latter matter depends upon the
19 approval of Keen in order for us to carry it
20 forward, we think it probably makes logical
21 sense to start with the issue of the Keen
22 retention first, if the court has no objection.

23 THE COURT: No, none whatsoever.

24 MR. PECK: Keen Realty is a firm
25 that specializes in troubled real estate and

Accessory Place, Inc.

leases. The debtor engaged in discussions with Keen representatives shortly after the commencement of this case and following negotiation entered into an agreement which is attached to the application to retain Keen. Notice of presentment was given to the top 20 creditors, the office of the U.S. Trustee and others who had requested notice in the case, with a presentment date of March 4 at 12 noon. We received notice orally and then a formal objection from Brian Massumoto of the office of United States trustee, raising questions not with respect to whether or not it was a sound exercise of the debtor's business judgment to retain Keen or a firm like Keen but raising a number of concerns concerning Keen's compliance with the guidelines for professionals in this district.

I understand, based upon a report from Harold Bordwin, who is a vice president of Keen Realty, that conversations took place yesterday between Mr. Massumoto and Mr. Bordwin in an effort to resolve these objections and unfortunately, while there was an open

1 Accessory Place, Inc.

2 discussion, the objections remain unresolved
3 and will have to be resolved by the court.

4 I don't wish to characterize them
5 because I think the representatives of the
6 office of the U.S. Trustee can do so, but
7 fundamentally, and without limiting their
8 ability to comment, the objections relate to
9 the payment of an alleged postpetition
10 retainer, a deviation from the time and
11 record-keeping requirements of the guidelines
12 and the filing of a fee application. A number
13 of cases were cited in support of those
14 objections and the materials submitted by the
15 U.S. Trustee in writing. I have reviewed those
16 cases. They all relate to the retention of
17 lawyers by a debtor. Some of them, I believe,
18 are distinguishable and I would ask, before
19 commenting on the legal merits, that the U.S.
20 Trustee's office make whatever comments they
21 wish to make with respect to these objections
22 and then either Mr. Bordwin or I will comment
23 in response.

24 THE COURT: All right. Does the
25 U.S. Trustee wish to be heard?

1 Accessory Place, Inc.

2 MS. STRASSBERG: Counsel is
3 correct. We have filed an objection and our
4 objection is limited to the basic fee
5 arrangement as proposed by the applicant and
6 the debtor.

7 Our objection is on three points.
8 First of all, it appears that upon the
9 execution of this order that will be submitted
10 today, Keen Realty will be paid up-front
11 approximately \$24,500, what our office believes
12 is in a postpetition retainer.

13 Secondly, it appears that Keen
14 will also be paid upon consummation of a
15 transaction, an assignment or pursuant to the
16 terms of the letter of engagement. We would
17 submit that prior to any payments to Keen
18 Realty it should be done on notice and
19 application to all creditors.

20 Finally, the applicant has
21 requested to be exempted from the time-keeping
22 requirements as imposed by the local rules and
23 the guidelines. We would submit that it is
24 necessary in order to determine the
25 reasonableness of the applicant's fees to keep

1 Accessory Place, Inc.

2 contemporaneously time records that should be
3 submitted in accordance with any fee
4 application submitted to this court.

5 THE COURT: What is the proposal,
6 the compensation proposal for Keen on a
7 per-lease basis?

8 MS. STRASSBERG: To me?

9 THE COURT: Yes.

10 MS. STRASSBERG: I think the
11 compensation is on a gross proceeds basis, but
12 the minimum would be, guarantee minimum of
13 \$2500 based on any single transaction, and
14 overall is subject to a cap of 20 percent.

15 THE COURT: So it is \$2500 per
16 lease and a cap of 20 percent of the gross
17 proceeds?

18 MS. STRASSBERG: I believe that's
19 correct, your Honor.

20 THE COURT: Is that it, Mr. Peck?

21 MR. PECK: Your Honor, that is
22 correct, although, the use of gross proceeds, I
23 think, is misleading. So let me make a
24 clarification on the record. There is a
25 reference to net proceeds in the agreement, but

Accessory Place, Inc.

net proceeds, as it is defined, does not include a variety of other expenses that might otherwise be deducted for purposes of calculating a net amount realized by the estate. So that it is a 20 percent cap on net proceeds as that term is defined in the agreement, but for some purposes, in common speech, it might mean gross proceeds. It really means gross proceeds less cure amounts and other amounts that must be paid in order to assume and assign the lease, but does not include expenses such as the out-of-pocket expenses of Keen for advertising and related expenses, nor does it include closing costs as that term is sometimes used.

THE COURT: So, the minimum payment to Keen under this deal is how much?

MR. PECK: The minimum payment to Keen is \$24,500. That would be \$500 per lease location.

THE COURT: You mean assuming you sell all the leases?

MR. PECK: If we were to sign this agreement -- we have signed it. If we were to

1 Accessory Place, Inc.

2 be approved and we were to make a judgment to
3 reject all leases and not use Keen's services,
4 they would still have earned a fee of \$24,500
5 for the 49 locations. On a closed transaction
6 basis, and the debtor retains full discretion
7 to determine whether or not to close any
8 transaction, there would be a fee of \$2500, or
9 six percent of the net proceeds, whichever is
10 greater, but in those events where amounts
11 realized on a closed transaction are less than
12 the \$2500 and we are not as a debtor persuaded
13 to close a transaction, there is a compromise
14 fee that represents some 50 percent of the
15 actual amount received by the debtor.

16 THE COURT: Say that again. Now
17 the actual proceeds are going to equal \$2000.

18 MR. PECK: If there were a
19 transaction that realized for the debtor \$2000
20 for the sake of discussion and in such event
21 the minimum fee of \$2500 would make it
22 commercially impractical for the debtor to
23 close such a transaction, the agreement
24 provides that the proceeds, call it \$2000 in
25 this example, would be split 50-50 in lieu of

1 Accessory Place, Inc.

2 the regular fee arrangement.

3 THE COURT: All right.

4 MR. PECK: As an overlay on top of
5 all of the fees to be earned by Keen is a
6 negotiated cap, which I understand from Mr.
7 Bordwin is an unusual arrangement and one that
8 resulted from these particular negotiations.
9 The cap on overall compensation provides a
10 limit of 20 percent on net proceeds as to all
11 compensation realized. It was designed, at
12 least from the debtor's perspective, to avoid
13 the risk that on a transaction by transaction
14 basis there would be an accumulation of \$2500
15 minimum fees which had the effect of skewing
16 the fees such that they would on an overall
17 basis disproportionately compensate Keen
18 relative to the benefits to the estate. I
19 think that's at least my attempt to paraphrase
20 the compensation arrangements in this
21 agreement, and to the extent that I have
22 misstated anything, since Mr. Bordwin is here,
23 if he can, with the court's permission, clarify
24 anything that I just stated.

25 THE COURT: The \$24,500 is on

1 Accessory Place, Inc.

2 account of the \$2500 or in addition to the
3 \$2500 per lease?

4 MR. PECK: The \$24,500 is on
5 account of that. There is a \$500 payment which
6 off-sets any closed transaction. So that on a
7 lease-by-lease basis, if one were to close
8 lease 80, just to pick an arbitrary number, and
9 there was a fee of \$2500 earned, there would be
10 an incremental \$2000 payable upon the closing
11 of that transaction, but if lease 80 were to
12 result in a rejection and there were no
13 proceeds to the estate, the \$500 would not be
14 offset against any other fee.

15 THE COURT: It wouldn't be offset
16 against the 60 percent overall -- a 20 percent
17 overall?

18 MR. PECK: I think it would be
19 included in the 20 percent cap as a fee, but it
20 wouldn't be an offset against an earned
21 commission.

22 THE COURT: Except to the
23 extent -- maybe it is not an offset, but it
24 does --

25 MR. PECK: It is part of the

1 Accessory Place, Inc.

2 overall compensation for purposes of
3 determining the applicability of the 20 percent
4 cap, but it is a transaction-by-transaction
5 offset.

6 THE COURT: Understood. All
7 right. What is the U.S. Trustee's position with
8 respect to the guidelines?

9 MS. STRASSBERG: I think for the
10 reasons just explained by counsel, all of the
11 possible contingencies that might occur in this
12 case which vary with their proposal to market
13 and assign these properties will lend more to
14 the U.S. Trustee's position that prior to any
15 payments based on a transactional basis should
16 be subject to a noticed hearing to determine
17 the reasonableness. At this time there are so
18 many contingencies out there, it is impossible
19 at this time for any parties in interest to
20 determine the reasonableness of the fees
21 requested.

22 THE COURT: Isn't this just a
23 contingent fee arrangement, isn't it closely
24 associated with that? They are saying, in
25 substance, we will market the leases. We will

1 Accessory Place, Inc.

2 sell them and we will get paid and our overall
3 compensation won't exceed 20 percent of the net
4 proceeds and on a lease-by-lease basis we will
5 take \$2500, if there is at least that. They are
6 basically saying, look, we are willing to do
7 this for a percentage of what it is what's
8 realized in these transactions. We are
9 proposing, we do this all time. We think we
10 know how to do it better than anybody else and
11 we just want to do it on a percentage basis.

12 MS. STRASSBERG: That's correct.
13 Except for the fact that by looking at the
14 applicant's own letter of engagement, I think
15 they can themselves concede of instances where
16 a fee calculated on a percentage basis might be
17 unreasonable; for example, it is proposed that
18 if the leases are consummated -- or assigned to
19 an entity called Claire's Boutique, in that
20 instance they have already stated in their
21 letter of engagement that they agreed with the
22 debtor to reduce it commissions based upon the
23 assignment to Claire's Boutique. So it appears
24 that there are situations where the applicant
25 already concedes that the terms of their

1 Accessory Place, Inc.

2 retention might be unreasonable. For the same
3 reason, it is our position, your Honor, that
4 prior to any payments of compensation, other
5 parties in interest, as well as the debtor or
6 any creditors, including our office, should be
7 given an opportunity to determine the
8 reasonableness of the transaction.

9 THE COURT: Do you think there
10 will come a time when after you have seen what
11 they do they ought to get more than they said
12 they would take?

13 MS. STRASSBERG: No. I don't
14 think--

15 THE COURT: Is that fair, with all
16 due respect, is it fair then to say heads I
17 win, tails you lose? You can sign on for up to
18 20 percent of the net proceeds. It may turn out
19 that you have made a bad deal and you end up
20 spending a lot more time on this than you had
21 originally intended, yet you are still stuck
22 with 20 percent. However, if you have made a
23 good deal and you spend just the amount of time
24 you think you will spend and you capitalize on
25 your experience in the marketplace and the

1 Accessory Place, Inc.

2 expertise that you bring, you shouldn't be
3 compensated for it. Is that a fair result? Any
4 more than if you said to the lawyer who comes
5 in and says I will take the securities action
6 on a contingent fee basis and she goes out and
7 writes a magnificent brief, wins the matter on
8 a motion hands down, that somebody comes back
9 and says, well, you are not entitled to what
10 you agreed to do it on, whereas if you took it
11 to trial, went through all of the appeals,
12 three years later you were successful, you
13 still would only get what you agreed to. Do
14 you think that's right?

15 MS. STRASSBERG: Well, in the
16 circumstances proposed by your Honor, no; I
17 agree. From our office's perspective, it has
18 been a consistent policy of our office. We have
19 tried to make accommodations for the applicant
20 in cases such as this. It has consistently been
21 our policy that prior to any payments, you
22 should be subject to a Notice of Hearing, but
23 of course it is within your discretion whether
24 or not to require that hearing. The only other
25 concern our office would have would be when the

1 Accessory Place, Inc.

2 applicant finally does submit time records, the
3 form of the time records that they are
4 proposing to submit to the court and other
5 parties in interest.

6 THE COURT: All right. Does the
7 funder wish to be heard?

8 MR. TEITELBAUM: Jay Teitelbaum;
9 Zalkin, Rodin & Goodman, on behalf of Royal
10 Hawaiian.

11 THE COURT: Notice I didn't say
12 the bank.

13 MR. TEITELBAUM: I appreciate
14 that. We have reviewed the Keen application and
15 in fact the retainer agreement, and we had some
16 comments and they were communicated to debtor's
17 counsel and incorporated, and as the party with
18 the dollars on the line here, we believe it
19 makes a lot of sense to retain Keen on the
20 terms and conditions set forth there, not to
21 add any further bells and whistles regarding
22 fee applications, time records, etc., and this
23 Court has done similar applications in other
24 matters and not required it. We know who Keen
25 is and what kind of job they can do.

1 Accessory Place, Inc.

2 Another concern that we believe we
3 have addressed is regarding the carve-out. We
4 believe that by working with the debtor, we
5 have at least implicitly -- and I am stating
6 it here for the record, we have consented the
7 carve-out would extend to make sure Keen's fees
8 would be paid as an administrative priority.

9 So, your Honor, we are just
10 standing here to support the debtor's
11 application to retain Keen and hopefully get
12 this case closed out as quickly and efficiently
13 as possible.

14 THE COURT: Does anyone else wish
15 to be heard?

16 MR. PECK: I would simply like to
17 clarify the record in respect to Claire's
18 Boutique as a variation on the compensation
19 theme within the agreement. Because there were
20 discussions that had taken place prior to the
21 commencement of this bankruptcy case between
22 debtor's representatives and Claire's, it was
23 determined that there should be a different
24 compensation arrangement as to Claire's and
25 that's built into the agreement. It provides

1 Accessory Place, Inc.

2 for five percent commission instead of the six
3 percent that applies to other transactions
4 because conversations were already underway,
5 and it also provides a certain bonus
6 compensation in the event that overall amounts
7 realized from the Claire's transaction exceeds
8 a certain amount which is set forth in the
9 application.

10 With regard to the U.S. Trustee's
11 concern on compliance with the guidelines,
12 speaking on behalf of the debtor, we believe
13 that it is appropriate, given the nature of the
14 services that to are to be rendered by Keen,
15 that Keen be excused from the traditional
16 time-keeping requirements that have just been
17 alluded to in counsel's comments. Keen is an
18 entity which traditionally provides services
19 unrelated to the recording of time more
20 comparable to a real estate broker that might
21 be retained to sell residential real estate or
22 cooperative apartment in New York City in which
23 a commission is earned upon generation of a
24 transaction.

25 Additionally, from the debtor's

1 Accessory Place, Inc.

2 perspective, we view what Keen will be doing is
3 in a sense the outlay of services by an
4 organization which no longer has within its
5 infrastructures sufficient expertise or
6 sufficient staff to conduct the kinds of
7 negotiations that we believe are necessary
8 during the period between Keen's retention and
9 the proposed auction to be discussed in our
10 next application. So we are, in a sense,
11 acquiring businesspeople who are committed to
12 this effort and who have background and
13 experience to do work that would otherwise be
14 done by the debtor. This is not the kind of
15 work which is typically or ever compensated on
16 an hourly basis. So we would urge that there
17 be a deviation from the guidelines in respect
18 of time keeping.

19 However, we have discussed with
20 Mr. Bordwin, and Mr. Bordwin has agreed to
21 submit, a final application at the conclusion
22 of his services that would summarize the fees
23 and expenses associated with the undertaking
24 and it would be on notice to the list that's
25 entitled to notice and would be heard and

1 Accessory Place, Inc.

2 determined in a manner comparable to the fee
3 applications that we anticipate having to file
4 here as well as our own firm.

5 THE COURT: They would receive
6 payments on account during the pendency of the
7 case?

8 MR. PECK: They would receive
9 payments in accordance with the application
10 that's now before your Honor and the agreement
11 which is attached to that application.

12 THE COURT: I understand that.
13 That would be on account?

14 MR. PECK: Yes.

15 THE COURT: You are not proposing
16 that they submit the application and then get
17 compensated at the end. You are saying they
18 would file something to show what they did, the
19 transactions they brokered, calculate the
20 commissions in accordance with the agreement
21 and ask for final approval of that.

22 MR. PECK: That's correct.

23 THE COURT: With the understanding
24 that there is a possibility that they may not
25 get final approval for it?

1 Accessory Place, Inc.

2 MR. PECK: I think that's inherent
3 in the process, your Honor.

4 THE COURT: Is a representative of
5 Keen here?

6 MR. BORDWIN: Yes.

7 THE COURT: Let's make explicit
8 that which is inherent in the process.

9 MR. BORDWIN: Harold Bordwin, an
10 officer and principal of Keen Realty, and we
11 understand that we will file a final fee
12 application in the case and any fees and
13 disbursements that we received are subject to
14 judicial review and potential disgorgement, if
15 necessary.

16 THE COURT: All right, that would
17 be fine. Anything else from the U.S. Trustee?

18 MS. STRASSBERG: No, your Honor.

19 THE COURT: I note there is no
20 objection to the retention of Keen, the
21 necessity of bringing in Keen to handle the
22 matters which are the subject of the next
23 hearing. The U.S. Trustee's objection as more
24 fully set forth in the U.S. Trustee's papers
25 goes to the compensation arrangements arrived

1 Accessory Place, Inc.

2 at between the debtor and Keen, more
3 specifically the payment on account during the
4 pendency of the case, as well as the necessity
5 for Keen to file a fee application and keep
6 contemporaneous time records detailing the
7 efforts that it undertakes in marketing and
8 selling the leases.

9 I respectfully disagree with the
10 U.S. Trustee that Keen ought to be required to
11 comply with our guidelines or the guidelines of
12 the U.S. Trustee. Although we find those to be
13 very, very helpful in assisting the court in
14 its analysis of fee applications, I think the
15 benefit of those guidelines is more significant
16 when you are dealing with the more traditional
17 professional, that being an accountant or an
18 attorney. Here Keen is being retained to
19 undertake a marketing program of all of the
20 leases and what is being retained here is
21 Keen's expertise in that regard, something that
22 is not necessarily easily translatable into
23 time spent with respect to any particular
24 lease.

25 I am satisfied that the

Accessory Place, Inc.

arrangement reached by the debtor is in the best interests of the estate and the creditors, all of course subject to final approval after the engagement is completed, but what I am prepared to do is to excuse Keen from complying with the fee guidelines, but Keen is going to be required, Mr. Bordwin has acknowledged, to file at the end of its engagement a final fee application and in there it is going to be required to provide sufficient detail in affidavit form respecting the efforts it made, it undertook in marketing and selling the leases as well as the breakdown of the calculation of the fee as tied to the agreement so that somebody reviewing it will be able to make appropriate reference to the agreement to determine whether or not the fee, based upon the agreement, is an appropriate fee.

Given the kind of work that Keen is doing, and under these circumstances, this being a liquidating case, I am not troubled with the payment on account prior to the final hearing on the award. That is in large part because of our familiarity with the Keen group,

1 Accessory Place, Inc.

2 the amount of work that it does in this court
3 and the acknowledgment by Mr. Bordwin that any
4 payment it receives either on account of the
5 fee or reimbursement of expenses is subject to
6 disgorgement, if ultimately that's what the
7 court determines.

8 Accordingly, we respectfully
9 overrule the trustee's objection. We approve
10 the retention of Keen. Do you have an order.
11 Is it substantially in the form that was
12 annexed to the moving papers?

13 MR. PECK: It is substantially in
14 the form annexed. However, there have been the
15 following changes made that I will read into
16 the record. There is the addition of a
17 reference on page 1 of the order in the first
18 paragraph to the objections that have been
19 filed and it says now, "And upon consideration
20 of all objections to the application, including
21 the objections submitted by the office of the
22 U.S. Trustee," and in addition there is some
23 new language added at the very end of the order
24 which anticipated the outcome of today's
25 hearing and as a result is in a form which I

1 Accessory Place, Inc.

2 think is suitable to execution without further
3 adjustment which reads, the final decretal
4 paragraph, "ORDERED that Keen shall be paid by
5 the debtor in accordance with the terms of the
6 retention agreement. Subject to the filing of
7 a final fee application, Keen shall be exempt
8 from the requirements set forth in the
9 Administrative Order re Guidelines for Fees and
10 Disbursements for Professionals in Southern
11 District of New York bankruptcy cases,
12 docketed June 24, 1991, relating to the keeping
13 of time records and the submission of periodic
14 summaries of fees and expenses."

15 THE COURT: All right. Does the
16 U.S. Trustee wish to be heard?

17 MR. MASSUMOTO: Just one point of
18 clarification. In your ruling you are also
19 ruling that they are entitled to receive the
20 postpetition retainer?

21 THE COURT: Yes, I am.

22 MR. MASUMOTO: Thank you.

23 THE COURT: I have reviewed the
24 proposed order. Does the U.S. Trustee wish to
25 review it? It is substantially in the form to

1 Accessory Place, Inc.

2 that which was annexed other than what Mr. Peck
3 just outlined on the record.

4 MR. MASSUMOTO: That's fine.

5 THE COURT: No objection to the
6 form?

7 MR. MASUMOTO: No.

8 THE COURT: I have reviewed the
9 proposed order. I have dated it today's date.
10 I have signed it.

11 MR. PECK: Now that Keen Realty
12 has officially been retained, we can from the
13 debtor's perspective move to the next item on
14 the docket today and that is the hearing on the
15 order to show cause that was entered on
16 February 27, 1996 and which relates to the
17 scheduling and conduct of an auction of
18 debtor's unexpired real estate leases. Notice
19 was sent in accordance with the order to show
20 cause to the debtor's top 20 creditors, to the
21 debtor's landlords, and to parties who have
22 requested notice as well as to the office of
23 the U.S. Trustee and to Royal Hawaiian Shopping
24 Center.

25 As of 5 p.m. yesterday, which was

EXHIBIT B

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 10-13779 (ALG)

5 - - - - -x

6 In the Matter of:

7
8 JENNIFER CONVERTIBLES, INC., ET AL.,

9
10 Debtors.

11
12 - - - - -x

13
14 United States Bankruptcy Court
15 One Bowling Green
16 New York, New York

17
18 August 10, 2010

19 11:31 AM

20
21 B E F O R E:
22 HON. ALLAN L. GROPPER
23 U.S. BANKRUPTCY JUDGE
24
25

1 HEARING re Motion filed by debtors for approval of adequate
2 assurance of payment to utility services and continuation of
3 service.

4

5 HEARING re Application filed by debtors for authorization to
6 employ and retain TM Capital Corp. as financial advisors to the
7 debtors.

8

9 HEARING re Application filed by debtors for authorization to
10 employ and retain Olshan Grundman Frome Rosenzweig & Wolosky
11 LLP as attorneys for the debtors nunc pro tunc to the petition
12 date.

13

14 HEARING re Application filed by debtors for authorization to
15 employ and retain KPMG CF Realty LLC as special real estate
16 advisor for the debtors nunc pro tunc to the petition date.

17

18 HEARING re Motion filed by debtors for administrative order
19 establishing procedures for interim compensation and
20 reimbursement of expenses of professionals.

21

22 HEARING re Omnibus limited objection/request for adequate
23 protection of Ashley HomeStores, Ltd., with respect to
24 continued use of trademark and certain matters.

25 Transcribed by: Penina Wolicki

1
2 A P P E A R A N C E S :

3 OLSHAN GRUNDMAN FROME ROSENZWEIG & WOLOSKY, LLP

4 Attorneys for Debtors

5 Park Avenue Tower

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7 New York, NY 10022

8
9 BY: MICHAEL FOX, ESQ.

10 JORDANNA L. NADRITCH, ESQ.

11
12
13 U.S. DEPARTMENT OF JUSTICE

14 Office of the U.S. Trustee

15 33 Whitehall Street

16 21st Floor

17 New York, NY 10004

18
19 BY: NAZAR KHODOROVSKY, ESQ.

20 ANDREW VELEZ-RIVERA, ESQ.

21
22
23
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25

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7 BY: JASON R. ADAMS, ESQ.

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16 BY: EDWARD E. NEIGER, ESQ.

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18 WILLKIE FARR & GALLAGHER LLP

19 Attorneys for KPMG CF Realty

20 787 Seventh Avenue

21 New York, NY 10019

22
23 BY: ROBIN SPIGEL, ESQ.

1 P R O C E E D I N G S

2 THE COURT: Jennifer Convertibles.

3 (Pause)

4 THE COURT: Do we have anyone on the phone for
5 Jennifer?

6 THE CLERK: No, Your Honor.

7 THE COURT: All right. Then we can close the line.

8 (Pause)

9 THE COURT: All right, may I have appearances in
10 Jennifer Convertibles, please?

11 MR. FOX: Good morning, Your Honor. Michael Fox and
12 Jordanna Nadritch representing Jennifer Convertibles.

13 MR. VELEZ-RIVERA: Andrew Velez-Rivera for the United
14 States Trustee.

15 MR. ADAMS: Jason Adams of Kelley Drye & Warren on
16 behalf of the committee.

17 MR. NEIGER: Good morning, Your Honor. Edward Neiger,
18 Neiger LLP, on behalf of Mengnu Group Co. -- Haining Mengnu
19 Group Co. Inc. Thank you.

20 THE COURT: Anyone else appearing? All right.

21 MR. FOX: The only thing I'd like to bring to your
22 attention, Your Honor, is that I received an e-mail late last
23 night from Nathan Schultz, representing Ashley, saying that he
24 had no objection to any of the relief today and I was so
25 authorized and directed to make that announcement to you.

1 THE COURT: Very good.

2 MR. FOX: Well, Your Honor, today we have, hopefully,
3 a short agenda. And again, I think it's just a function of us
4 trying to work with as many of the constituencies that are in
5 front of us, so that when we are in front of you, when we go
6 through the different applications and motions, hopefully
7 they've been vetted and we've obtained as much consent as
8 possible from the different parties.

9 THE COURT: All right.

10 MR. FOX: I think, as the agenda will reflect, I'm
11 happy to go through it any particular order --

12 THE COURT: Well, I have your agenda. Let's start
13 with the Olshan retention. Does anyone wish to be heard?

14 All right. You've satisfied the U.S. Trustee and I'll
15 be happy to sign the order.

16 MR. FOX: Thank you.

17 THE COURT: Thank you. We're also twenty days into
18 the case, so, you've complied with the rule. Let me just get
19 the right file.

20 MS. NADRITCH: Your Honor, we have proposed orders, if
21 that will be -- we can bring them up to you.

22 THE COURT: You have disks, right?

23 MS. NADRITCH: We have disks --

24 THE COURT: I have --

25 MS. NADRITCH: -- and hard copies.

1 THE COURT: -- right. I have new copies of the order.
2 And I think it's fine. All right. Very good.

3 Next on your agenda is the TM Capital retention.

4 MR. FOX: There's only one further clarification that
5 I need to make, although I think it is agreed to, and that's
6 that the deposit of 75,000 dollars that TM Capital was holding
7 prepetition will be applied prospectively as their -- pursuant
8 to any interim application or pursuant to any compensation
9 order that Your Honor would enter.

10 THE COURT: All right.

11 MR. FOX: So it won't be held as an evergreen.

12 THE COURT: All right. That's certainly good policy.
13 And do they have a success -- they have no success fee.

14 MR. FOX: They do have a success fee, Your Honor.
15 They have a success fee of 500,000 dollars that nobody is pre-
16 approving today.

17 THE COURT: That's going to go out for forty-five-day
18 notice? Is that --

19 MR. FOX: Well, that was not -- the --

20 THE COURT: -- is that --

21 MR. FOX: -- to satisfy the Trustee, what I --

22 THE COURT: What was done?

23 MR. FOX: We had agreed that the standard of review
24 would be reason -- subject to 330, so that upon an appropriate
25 plan, and hopefully we'll have a final application at the end

1 of the case, the U.S. Trustee and other parties will have that
2 opportunity to see if TM Capital has, in fact, met the burden.
3 However, the per se inclusion of the success fee at 500,000
4 dollars, they are not objecting to. They're just objecting
5 that they need to have the 330 review at the conclusion of the
6 case.

7 THE COURT: Where does it say that in the papers?

8 MR. FOX: In the proposed order -- I hope that Your
9 Honor has -- I'm happy to hand up --

10 THE COURT: Well, tell me what paragraph.

11 MR. FOX: Paragraph 3 and then paragraph 4.

12 THE COURT: Paragraph 3.

13 MS. NADRITCH: Paragraphs 3 and paragraph 6, Your
14 Honor.

15 THE COURT: Well, 3 says, "The transaction fee shall
16 be subject to Section 328." That --

17 MR. FOX: Which --

18 THE COURT: -- is not what you just said.

19 MR. FOX: -- but 3 is saying --

20 THE COURT: It is. And 6 says -- well, why don't we
21 just strike any reference to 328(a)?

22 MR. FOX: Well --

23 THE COURT: This is -- to me, this is absolutely and
24 totally ambiguous -- to me. If it's ambiguous to me, it's
25 going to be ambiguous to -- what you said on the record is

1 perfectly clear. So let's take out any reference to 328(a),
2 and we'll -- and I think this will be perfectly clear.

3 UNIDENTIFIED ATTORNEY: Your Honor, for purposes --

4 THE COURT: Either that, or make paragraphs 3 and 6
5 clear.

6 MR. FOX: Well, I will try to make 3 and 6 clear, Your
7 Honor, because what the intent of it is, is that the actual
8 term itself, under 328 is included, so everybody's aware of it
9 and that --

10 THE COURT: All right.

11 MR. FOX: -- it's part of their engagement terms. 330
12 just gives them the right to make sure that there's no finding
13 today that that provision wasn't in a previous agreement. And
14 I think it's subject to different standards than a bonus. This
15 is part of their transaction fee. And under 330 --

16 THE COURT: I don't understand.

17 MR. FOX: -- they reserve --

18 THE COURT: I thought it's going to be subject to
19 anyone's challenge on the basis of reasonableness.

20 MR. FOX: It will be subject to anybody's challenge --
21 the U.S. Trustee's challenge under 330, and every other party
22 has that same ability to object under the reasonable standard
23 under 330.

24 THE COURT: All right. That is not -- that's
25 different from many success fees that are entered where only

1 the U.S. Trustee reserves the right to challenge on
2 reasonableness grounds. Just make it clear. It's not clear.
3 Paragraph 3 and paragraph 6 look like they're contradictory.
4 Just make it clear.

5 MR. FOX: Okay. We'll submit something at the --
6 hopefully --

7 THE COURT: Just mark it up. Take a pen and mark it
8 up or I'll mark it up, so that it's clear. And paragraph 12, I
9 think is -- this is a new one to me. And this seems to bind
10 us -- I'll add, "as of the date hereof" at the beginning, and
11 at the end, "comma", "subject to the provisions of Section
12 328(a)," because I think this can be misread as writing out of
13 the Bankruptcy Code the second sentence of 328(a), which you
14 tell me is not what's -- it's not at all what's intended.

15 MR. FOX: It's not.

16 THE COURT: So I'll leave this in here, subject to
17 those two changes. But we still have to make paragraph --

18 MR. FOX: 3 and 6 reconciled.

19 THE COURT: -- 3 and 6 -- see, paragraph 3 is subject
20 to the limitations in paragraph 4. It should be subject to the
21 limitations --

22 MR. FOX: It should be paragraphs --

23 THE COURT: -- 4 and 6.

24 MR. FOX: Actually, Your Honor, to be --

25 THE COURT: Oh, I see. You're in 7. That's the

JENNIFER CONVERTIBLES, INC., ET AL.

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1 typical -- all right -- and 7. And that should be "all parties
2 retain." I think that's what you just told me. All parties
3 retain the right to review the success fee on reasonableness
4 grounds. If that's true, then, all "parties in interest" --
5 that's the --

6 MR. FOX: So 7 is the more operative paragraph.

7 THE COURT: -- retain -- yes, you're right. It is 7.
8 In the event there is an objection, provided -- and -- it's not
9 provided -- and the Court -- all right. I'll mark up 7. I
10 think it's now clear. All right. Thank you.

11 All right. Your next matter on your agenda is KPMG
12 retention.

13 MR. FOX: We have an interim order --

14 THE COURT: Why do we have an interim order for that?

15 MR. VELEZ-RIVERA: Well -- Andrew Velez-Rivera for the
16 United States Trustee, while Ms. Spigel makes her way to the
17 podium, Your Honor. KPMG and the U.S. Trustee are having a
18 philosophical disagreement --

19 THE COURT: Well, yes, you have a blank in here. I'm
20 tired of philosophical agreements (sic). Every other broker
21 that's retained in this Court agrees with the practices of the
22 U.S. Trustee, right? For some reason KPMG can't agree. Is
23 that what's happened?

24 MR. VELEZ-RIVERA: That's correct, Your Honor.

25 THE COURT: Well, there are a lot of brokers in this

1 city. And now, do we have an appearance for KPMG? Have you
2 given your card to the court reporter?

3 MS. SPIGEL: No. I will.

4 THE COURT: Would you please --

5 MS. SPIGEL: Yes.

6 THE COURT: -- before the end. But state your name
7 and state why KPMG has to be different from every other real
8 estate broker retained in any case before this Court.

9 MS. SPIGEL: Okay. It's Robin Spigel, Willkie Farr &
10 Gallagher, counsel for KPMG CF Realty. I do not believe that
11 KPMG is different from any other broker. The issue -- we have
12 compromised on all issues with the U.S. Trustee, other than the
13 standard of review. The blank in the order relates to a
14 further hearing date.

15 THE COURT: No, I don't see any reason. We have a lot
16 of things going on in this case. I don't see any reason why we
17 have to have this thing put over for a further hearing date on
18 an interim basis.

19 MS. SPIGEL: That's fine with KPMG CF. It was -- as a
20 courtesy, there was additional time requested by the U.S.
21 Trustee. But we're fine --

22 THE COURT: Well I --

23 MS. SPIGEL: -- we're fine going forward today.

24 THE COURT: -- and what's the issue?

25 MS. SPIGEL: The issue is --

1 THE COURT: That your fees should be subject to
2 reasonableness standards?

3 MS. SPIGEL: Yes, that's right. Your Honor, I would
4 say that KPMG CF often gets 328 review as a real estate
5 consultant. And there is a -- their formula for fees is
6 exactly what's contemplated under Section 328 of the Bankruptcy
7 Code. And for the U.S. Trustee -- I don't think that there is
8 a practice or procedure, necessarily for real estate
9 consultants as opposed to bankers, where they may give the U.S.
10 Trustee a 330 reasonableness review. Here, KPMG is entitled to
11 a certain fee related to the savings that the debtors will
12 get --

13 THE COURT: It's a contingency.

14 MS. SPIGEL: -- correct.

15 THE COURT: All right.

16 MS. SPIGEL: And I believe that that's what 328
17 specifically goes --

18 THE COURT: So what has to be retained then? What has
19 to go to Washington for further review?

20 MR. VELEZ-RIVERA: Oh, nothing, Your Honor. The
21 United States Trustee simply desires a breakdown and her rights
22 under Section 330, to review each of those transactions and the
23 fees derived therefrom.

24 THE COURT: Don't you have anything better to do? Of
25 course you can review each of those transactions to see if

1 they've satisfied the contingency. What's the issue, then?
2 What we're doing is we're setting the contingency. Is that
3 correct?

4 MS. SPIGEL: That's correct, Your Honor.

5 THE COURT: Fine. You can review each transaction.
6 It either satisfies the contingency or it doesn't. But we're
7 not going say well, this contingency should have been a little
8 bit lower because the amount is a little bit higher. 328 still
9 has a savings clause in the event of truly unforeseen
10 circumstances. The Second Circuit has allowed a very, very
11 narrow exception to that. So what's the issue?

12 MR. VELEZ-RIVERA: If that's your ruling, Your Honor,
13 we're perfectly fine in agreeing with it.

14 THE COURT: All right. That's my ruling. Let's
15 set -- finish this order and let's enter an order. And let's
16 stop saving -- I mean, I have so many U.S. Trustee reservations
17 outstanding in different cases that I can't keep track of them.
18 So I think it's time to bring some of these to a conclusion and
19 enter a final order. You're getting a -- I gather you're
20 getting a down payment and then everything else is on a
21 contingency. And that's in accordance with normal business
22 practice. All right.

23 MS. SPIGEL: Do you want me to mark up the order by
24 hand --

25 THE COURT: Why don't you and Mr. --

JENNIFER CONVERTIBLES, INC., ET AL.

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1 MR. VELEZ-RIVERA: We'll do it, Your Honor.

2 THE COURT: -- Velez-Rivera discuss marking up the
3 order and I'll enter an appropriate order. And I don't see any
4 reason to make this interim.

5 MS. SPIGEL: Thank you, Your Honor.

6 MR. VELEZ-RIVERA: We'll do that, Your Honor.

7 THE COURT: Thank you.

8 MR. FOX: Your Honor, we're very pleased with that,
9 because the KPMG contingency fee has been negotiated down many
10 times, so --

11 THE COURT: All right.

12 MR. FOX: -- that I understand why they wanted to come
13 today, because --

14 THE COURT: Well, I'm glad they're here.

15 MR. FOX: -- we're rooting for them to make as much
16 money as possible, because that means we would have saved much
17 more than we're paying them.

18 THE COURT: All right. Interim -- I think the next
19 one is interim compensation.

20 MR. FOX: Yes.

21 THE COURT: Does anyone wish to be heard? All right.
22 There doesn't appear to be any question in this case of the
23 debtors' administrative solvency. The only thing I would
24 request that you do, and it shouldn't cost you anything, is to
25 put your monthly fee requests that go to the fee examiner on

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1 the docket. Simply file it. I don't want a copy. But when
2 you submit it, it shouldn't cost anything to simply upload it
3 onto the docket.

4 MR. FOX: A summary sheet, you're talking about for --

5 THE COURT: You can serve --

6 MR. FOX: -- the professionals.

7 THE COURT: -- the summary sheet or the app -- the
8 applications ultimately go in every four months. I think a
9 summary sheet would be -- there's been criticism. Is there any
10 reason why the monthly statement can't be simply filed? If
11 that's difficult, we'll say a monthly page 3 -- the monthly
12 statement need not be filed, and the Court -- however, a
13 summary sheet should be filed. That's fine.

14 MR. VELEZ-RIVERA: That's fine with the United States
15 Trustee, Your Honor.

16 THE COURT: No, the U.S. Trustee has not ever objected
17 to that. I'll just put on page 3, "Provided, however, that" --
18 there is a summary sheet, right?

19 MR. FOX: Yes. The cover letter --

20 THE COURT: "The cover summary sheet should be filed."
21 Okay. All right. Then we'll enter that order. Thank you.

22 MR. VELEZ-RIVERA: Thank you, Your Honor.

23 THE COURT: All right. The next matter on your
24 calendar is utilities.

25 MR. FOX: Yes.

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1 MS. NADRITCH: I'm a little more familiar, Your Honor,
2 with the utilities motion, so I will speak to that. Your
3 Honor, we have no -- we received no objections to the
4 utilities -- the proposed procedures. We -- in an effort to
5 comport with practice and, you know, Your Honor's practice,
6 also in other cases, we are proposing to provide utilities with
7 a fifty percent deposit, to the extent they don't already have
8 a deposit in that amount or greater amount. And we have put
9 procedures in place such that to the extent that utilities
10 would request further adequate assurance, they can do so, and
11 we will have the opportunity to work with them and/or seek this
12 Court's guidance or further hearing as to any objections we
13 cannot resolve.

14 We have -- the committee actually provided us with
15 comments late last night which we've incorporated to some
16 extent, and provided Your Honor a further revised order this
17 morning. I believe those comments --

18 THE COURT: I don't know whether I have that. What
19 are the -- just state for the record what the further changes
20 are.

21 MS. NADRITCH: Of course, Your Honor. There was an
22 inclusion in paragraph 11, Your Honor. It provided further
23 that to the extent that the debtors terminate any utility
24 services, for instance, we close stores and their services are
25 no longer required, or we resolve other objections or make

JENNIFER CONVERTIBLES, INC., ET AL.

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1 arrangements with the specific utility regarding adequate
2 assurance and/or anticipate a reduction, essentially that the
3 utility will provide a refund of the appropriate portion of the
4 adequate assurance deposit in excess of whatever we agreed to
5 or the termination. And --

6 THE COURT: That's paragraph 11?

7 MS. NADRITCH: -- that's paragraph 11.

8 THE COURT: Okay. Why don't we just delete in that
9 paragraph the words "in their sole discretion," because I don't
10 think there's any issue of discretion here.

11 MS. NADRITCH: Understood.

12 THE COURT: All right.

13 MS. NADRITCH: And there was an inclusion, Your Honor,
14 between the current 12 and 13. I'm not sure in what you're
15 looking at -- we've included a new 13. Just that we will
16 actually provide notice of the order to all utilities. And to
17 the extent there are any future utilities that are added, we
18 will provide them with notice as well, and give them thirty
19 days to request adequate assurance and work with them on that
20 regard as well.

21 THE COURT: Fine.

22 MS. NADRITCH: Those are the only changes. And I
23 believe the committee has consented to the proposed order as it
24 is. And we have not received any comments from the U.S.
25 Trustee on the order.

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1 THE COURT: Does anyone wish to be heard? All right,
2 I'll enter an appropriate order.

3 MS. NADRITCH: Thank you, Your Honor.

4 THE COURT: If you want to hand it up with a disk,
5 that's fine.

6 MS. NADRITCH: We'll do that.

7 THE COURT: Anything else today?

8 MS. NADRITCH: I believe that's it for today, Your
9 Honor.

10 THE COURT: All right. Do we have -- what's our -- do
11 we have another hearing date?

12 MR. FOX: Well, we have, I think, August 31st as our
13 next hearing date, Your Honor. That's when we're going to be
14 seeking lease rejection procedures as well as rejection of five
15 leases. I think we've calendared that for August 31st.

16 THE COURT: And do we have an initial case conference
17 date? Did we ever set one in this case?

18 MS. NADRITCH: I don't believe -- I mean, I understand
19 that Your Honor has a slot for us on next Tuesday, August 17th.
20 But I don't think there are any motions on for that date. So
21 we wanted to inquire --

22 THE COURT: Well, why don't I simply adjourn that to
23 the 31st?

24 MS. NADRITCH: That would be --

25 THE COURT: I don't know if anybody -- do you know of

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1 any -- why don't you put on the docket a notice that the
2 initial case conference has been adjourned. You have a 341?

3 MS. NADRITCH: Yes, Your Honor. That is scheduled for
4 Wednesday, September 1st.

5 THE COURT: Well, that's quite a ways in the future.
6 All right.

7 MR. FOX: I think I -- Michael Fox, again. I think I
8 know why we have the 19th, is that --

9 MS. NADRITCH: The 17th.

10 THE COURT: The 17th.

11 MR. FOX: -- the 17th. It was because our stipulation
12 with Merrick Bank expires on the 18th.

13 THE COURT: Oh.

14 MR. FOX: Which we would probably likely be seeking a
15 further order of that in consultation with parties. Since we'd
16 be looking to get money back, I thought by the 17th it would be
17 good to have that, so if we have a further stipulation --

18 THE COURT: All right. Well, let's keep that date.

19 MR. FOX: -- let's keep that. And if --

20 THE COURT: And then we can adjourn it on that day.

21 MR. FOX: Or just limit it to Merrick Bank.

22 THE COURT: Merrick Bank and the initial case
23 conference. And then we'll just adjourn it.

24 MR. FOX: Thank you, Your Honor.

25 THE COURT: All right. Anything else?

1 Thank you very much.

2 MR. VELEZ-RIVERA: Thanks, Judge.

3 IN UNISON: Thank you, Your Honor.

4 (Proceedings concluded at 11:52 a.m.)

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I N D E X

RULINGS

Page Line

| | | |
|---------------------------|----|----|
| Application to retain | 6 | 14 |
| Olshan Grundman Frome | | |
| Rosenzweig & Wolosky as | | |
| counsel to debtors | | |
| approved | | |
| Application to retain TM | 10 | 7 |
| Capital approved as | | |
| modified on the record | | |
| Application to retain | 15 | 3 |
| KPMG CF Realty approved | | |
| with modifications | | |
| Debtors' interim | 16 | 21 |
| compensation motion | | |
| approved | | |
| Debtors' utilities motion | 19 | 2 |
| approved | | |

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Penina Wolicki

Digitally signed by Penina Wolicki
DN: cn=Penina Wolicki, o, ou,
email=digital1@veritext.com, c=US
Date: 2010.08.11 11:48:40 -04'00'

Penina Wolicki

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: August 11, 2010

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re:

JENNIFER CONVERTIBLES INC., *et al.*,

Debtors.
-----X

: Chapter 11
:
: Case No. 10-13779 (ALG)
:
: Jointly Administered
:
:

**ORDER AUTHORIZING EMPLOYMENT AND RETENTION OF
KPMG CF REALTY LLC, AS SPECIAL REAL ESTATE ADVISOR
FOR THE DEBTORS *NUNC PRO TUNC* TO THE PETITION DATE**

Upon consideration of the Application (the “Application”) of Jennifer Convertibles Inc., and certain of its affiliates and related entities, as debtors and debtors in possession (collectively, the “Debtors”), seeking entry of an order pursuant to Sections 327(a) and 328(a) of the United States Bankruptcy Code (the “Bankruptcy Code”), Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 2014-1 and 2016-1 of the Local Rules for the United States Bankruptcy Court for the Southern District of New York (the “Local Rules”), authorizing the employment and retention of KPMG CF Realty LLC (“KPMGCF”) as special real estate advisor for the Debtors *nunc pro tunc* to the Petition Date, on the terms and conditions set forth in the agreement between certain of the Debtors and KPMGCF (the “Engagement Letter”),² attached as Exhibit C to the Motion; and it appearing that the Court has jurisdiction to consider the Application and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that this matter is core pursuant to 28 U.S.C. § 157(b)(2)(A) and (O); and it appearing that venue is proper in this District pursuant to 28 U.S.C. § 1408; and the Court having determined that the relief sought in

² Capitalized terms used but not defined herein shall have the meanings ascribed thereto in the Engagement Letter.

the Application is in the best interests of the Debtors, their estates and all parties in interest; KPMGCF is “disinterested” and eligible for retention pursuant to Sections 101(14) and 327(a) of the Bankruptcy Code, the terms of the Engagement Letter, the terms of the Engagement Letter are reasonable and appropriate; and upon the *Declaration of Matthew Bordwin in Support of the Debtors’ Application to Retain and Employ KPMG CF Realty LLC as Special Real Estate Advisor Nunc Pro Tunc to the Petition Date*; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED that the Application is granted as set forth herein; and it is further

ORDERED that in accordance with Sections 327(a) and 328 of the Bankruptcy Code, Bankruptcy Rules 2014 and 2016, and Local Rules 2014-1 and 2016-1, the Debtors are authorized to employ and retain KPMGCF in accordance with the terms and conditions set forth in the Engagement Letter as of the Petition Date; and it is further

ORDERED that notwithstanding the foregoing paragraph, KPMGCF shall be entitled to payment according to its fee structure pursuant to section 328(a) of the Bankruptcy Code and not any other standard, including section 330 of the Bankruptcy Code; provided, however, that the United States Trustee for the Southern District of New York (the “U.S. Trustee”) may review KPMGCF’s expenses pursuant to section 330 of the Bankruptcy Code; and it is further

ORDERED that KPMGCF is authorized to perform the services set forth in the Engagement Letter, including:

- a. organize the lease information for each Renegotiation Property in a manner that clearly displays the store and lease economics. KPMGCF and Company will jointly establish negotiating goals and parameters, such as rent reductions, lease term modifications, and other leasehold concessions;
- b. contact the landlord for each Renegotiation Property and seek to negotiate

with the landlord for modifications in accordance with the parameters established by Company; and

- c. work with the landlords, the Company, and the Company's counsel to document all lease modification proposals;

and it is further

ORDERED that section 2.5 of the Engagement Letter shall be revised so that the \$5,000 Minimum Fee referenced shall be reduced to \$4,000 and that section 2.6 of the Engagement Letter shall be revised so that the \$3,500 Minimum Fee referenced shall be reduced to \$3,000; and it is further

ORDERED that the Debtors are authorized to compensate KPMGCF in accordance with the terms of the Engagement Letter and KPMGCF will not be required to file interim or final fee applications pursuant to Sections 330 and 331 of the Bankruptcy Code or keep time records in connection with its services performed under the Engagement Letter; and it is further

ORDERED that, notwithstanding the immediately preceding paragraph, upon conclusion of its engagement in these chapter 11 cases, KPMGCF shall be required to comply with the following procedures:

- a. The Debtors will request final allowance of the fees paid or to be paid to KPMGCF under the Engagement Letter (the "Fees") by filing a notice setting forth the total amount of fees paid or to be paid to KPMGCF with respect to each Renegotiation Property (the "Fee Notice") and serving the Fee Notice on the U.S. Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004, Attn: Nazar Khodorovsky, Esq.; and (ii) counsel to the Official Committee of Unsecured Creditors appointed in the Debtors' cases (the "Creditors' Committee").
- b. The Fee Notice shall contain information regarding: (i) the amount of the fees paid or to be paid per Renegotiation Property, (ii) a brief explanation of the method by which the amount of the fee for each Renegotiation Property was determined, and (iii) incurred and received expenses as of the date of the Fee Notice.

- c. The U.S. Trustee and the Creditors' Committee will have fourteen (14) days after the filing of the Fee Notice to file an objection to any portion of the fees and serve the objection on the Debtors and KPMGCF. Any objection to the Fee Notice shall set forth: (i) the amount of the fees to which the party is objecting, (ii) the Renegotiation Property the fees related to, and (iii) the reasons for the objection.
- d. If no party timely files and serves an objection to the Fee Notice, the Debtors shall be authorized to pay any fees that remain unpaid to KPMGCF in accordance with the Engagement Letter without further notice or authorization from the Court.
- e. If any party files a timely objection to the Fee Notice and KPMGCF, and the objecting party or parties are unable to resolve the objection, the Debtors or KPMGCF may schedule a hearing for the Court to determine the objection.

ORDERED that KPMG shall provide to the U.S. Trustee an accounting of all expenses reimbursed by the Debtors pursuant to the Engagement Letter that were not included in the Fee Notice and the U.S. Trustee will have fourteen (14) days after provision thereof to file an objection to any portion of the expenses and serve the objection on the Debtors and KPMGCF. If the Debtors, KPMGCF, and the objecting party or parties are unable to resolve the objection, the Debtors or KPMGCF may schedule a hearing for the Court to determine the objection; and it is further

ORDERED that KPMGCF's fees and expenses provided for in the Engagement Letter shall be treated as administrative expense claims; and it is further

ORDERED that during the pendency of these cases, paragraph 4 of Schedule I to the Engagement Letter, regarding limitation of liability, is deleted; and it is further

ORDERED that, notwithstanding paragraph 11(e) of the Engagement Letter, upon the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code, the Engagement Letter shall be terminated, unless the Debtors' chapter 7 trustee elects to continue to employ KPMGCF pursuant to the terms of the Engagement Letter; and it is further

ORDERED that all requests of KPMGCF for payment of indemnity pursuant to the Engagement Letter shall be made by means of an application (interim or final as the case may be) and shall be subject to review by the Court to ensure that payment of such indemnity conforms to the terms of the Engagement Letter and is reasonable based on the circumstances of the litigation or settlement in respect of which indemnity is sought, provided, however, that in no event shall KPMGCF be indemnified in the case of its own bad-faith, self dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct; and it is further

ORDERED that in no event shall KPMGCF be indemnified if the Debtors or a representative of the estate, asserts a claim for, and a court determines by final order that such claim arose out of, KPMGCF's own bad-faith, self-dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct; and it is further

ORDERED that in the event KPMGCF seeks reimbursement for attorneys' fees from the Debtors pursuant to the indemnity provisions in the Engagement Letter, the invoices and supporting time records from such attorneys shall be included in KPMGCF's own applications for approval of indemnity payments (both interim and final) and such invoices and time records shall be subject to the United States Trustee's guidelines for compensation and reimbursement of expenses and the approval of the Bankruptcy Court under the standards of Sections 330 and 331 of the Bankruptcy Code without regard to whether such attorney has been retained under Section 327 of the Bankruptcy Code and without regard to whether such attorney's services satisfy Section 330(a)(3)(C) of the Bankruptcy Code; and it is further

ORDERED that the Debtors are authorized, empowered and directed to take all actions necessary to implement the relief granted pursuant to this Order; and it is further

ORDERED that to the extent the terms of this Order differs from the Engagement Letter, the terms of this Order shall govern; and it is further

ORDERED that during the pendency of these cases, this Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation of this Order and neither the Debtors nor KPMGCF shall be required to seek authorization from any other jurisdiction with respect to the relief granted by this Order.

Dated: New York, New York
August 10, 2010

/s/ Allan L. Gropper
THE HONORABLE ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|--------------------------|---|------------------------|
| ----- | X | |
| In re | : | Chapter 7 |
| | : | |
| BARBARA ZEIFER, | : | Case No. 13-12228 (MG) |
| AKA BARBARA A ZEIFER, | : | |
| AKA BARBARA ALYN ZEIFER, | : | |
| AKA BARBARA ANN ZEIFER, | : | |
| | : | |
| Debtor. | : | |
| ----- | X | |

**ORDER AUTHORIZING EMPLOYMENT AND RETENTION OF GA
KEEN REALTY ADVISORS, LLC AS SPECIAL REAL ESTATE
ADVISOR TO THE CHAPTER 7 TRUSTEE**

Upon the application, dated May 19, 2014 (the “Application”), of Yann Geron (the “Trustee”), as the chapter 7 trustee of the estate of Barbara Zeifer, aka Barbara A Zeifer, aka Barbara Alyn Zeifer, aka Barbara Ann Zeifer (the “Debtor”), the above-captioned debtor, for an order, pursuant to 11 U.S.C. §§ 327(a) and 328, authorizing the employment and retention of GA Keen Realty Advisors, LLC, a division of Great American Group (“GA Keen Realty”), as the Trustee’s Special Real Estate Advisor for the disposition of the real property located at 1 Market Centre Place, New York, New York (the “Property”), pursuant to the terms of the Engagement Letter¹; and upon the declaration of Mark P. Naughton, General Counsel to GA Keen Realty, in support thereof; and it appearing that GA Keen Realty represents no interest adverse to the Trustee, the Debtor, her estate or creditors with respect to the matters for which GA Keen Realty is to be engaged, that GA Keen Realty is a disinterested person as that term is defined in 11 U.S.C. § 101(14), and that its employment is necessary and in the best interests of the estate; and for good and sufficient cause, it is hereby

¹ Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Application.

ORDERED, that the Trustee is hereby authorized to employ and retain GA Keen Realty, pursuant to 11 U.S.C. §§ 327(a) and 328, and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure, as his Special Real Estate Advisor for the purposes of marketing and selling the Property, pursuant to the terms of the Engagement Letter; and it is further

ORDERED, that the GA Keen Realty's retention shall be effective from the date of the Engagement Letter through the closing of the Transaction, or for a period of nine (9) months from the date of the Engagement Letter, whichever comes first, which engagement can be extended pursuant to the same terms and conditions upon written mutual consent of the parties without the need for further application to the Bankruptcy Court; and it is further

ORDERED, that GA Keen Realty shall be entitled to a commission of 4% of the Gross Proceeds from the Transaction, provided however that, if the buyer of the Property is properly represented by a real estate broker, then GA Keen Realty shall be entitled to a commission of 2.5% of the Gross Proceeds from the Transaction and the buyer's broker shall be entitled to a commission of 2.5% of the Gross Proceeds from the Transaction; and it is further

ORDERED, that GA Keen Realty shall be paid its fees directly from the proceeds of the Transaction, in full, simultaneously with the closing or other consummation of the Transaction; and it is further

ORDERED, that GA Keen Realty shall not be required to submit fee applications and shall be compensated in accordance with the procedures set forth in the Application and the Engagement Letter and such procedures as may be fixed by order of this Court; and it is further

ORDERED, that the Court has and shall retain jurisdiction to hear and determine all matters arising from the implementation of the Engagement Letter and this Order and neither the Trustee nor GA Keen shall be required to seek authorization from any other jurisdiction with respect to the relief granted by this Order.

Dated: May 30, 2014
New York, New York

/s/Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge

NO OBJECTION:

Dated: New York, New York
May 28, 2014

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Richard W. Fox
Richard W. Fox
Trial Attorney

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|----------------------------|---|-------------------------|
| -----x | | Chapter 11 |
| In re: | : | |
| | : | Case No. 05-11563 (SMB) |
| THE PERFECT PICTURE CORP., | : | |
| | : | |
| | : | |
| | : | |
| | : | |
| Debtor. | : | |
| -----x | | |

ORDER UNDER 11 U.S.C. §327(a) AND §328(a) FED. R. BANKR. P. 2014
AND S.D.N.Y. LBR 2014-1 AUTHORIZING RETENTION OF
KEEN REALTY LLC AS SPECIAL REAL ESTATE CONSULTANT

Upon consideration of the application dated March 10, 2005 (the “Application”), by The Perfect Picture Corporation, debtor and debtor-in-possession in the above-captioned case (the “Debtor”), for an order under sections 327(a) and 328(a) of title 11 of the United States Code (the “Bankruptcy Code”), and Fed. R. Bankr. P. 2014 and 5002 authorizing the Debtor to retain Keen Realty, LLC as special real estate consultants (“Keen”); and the Court being satisfied that Keen does not represent any interest adverse to the estate with respect to the matters upon which it is to be engaged, that Keen is a disinterested person as that term is defined under section 101 (14) of the Bankruptcy Code, as modified by section 1107 (b) of the Bankruptcy Code; and it appearing that the relief requested in the Application is necessary and in the best interests of the Debtor’s estate and its creditors; and upon the record herein; and after due deliberation thereon; and sufficient notice having been given; and good and sufficient cause appearing therefore, it is hereby

ORDERED, that the Debtor is authorized to retain Keen, pursuant to sections 327(a) and

328(a) of the Bankruptcy Code, to perform the services set forth in the Application and the retention agreement attached to the Application as Exhibit A (the "Retention Agreement"), on the terms and conditions set forth in the Retention Agreement; and it is further

ORDERED, that the Keen shall **SMB 3/23/05** ~~not be required to submit fee applications~~
~~and shall~~ be compensated in accordance with the procedures set forth in the Application and Retention Agreement and such procedures as may be fixed by order of this Court.

Dated: New York, New York
March 23, 2005

/s/ STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT E



So Ordered.

Signed this 31 day of July, 2015.

Diane Davis
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

NIRVANA, INC., *et al.*,¹

Debtors.

Case No. 15-60823
Chapter 11 Case
Main Case
Jointly Administered

**ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT
OF KEEN-SUMMIT CAPITAL PARTNERS LLC
AS THE BUSINESS BROKER TO THE DEBTORS**

Debtors Nirvana, Inc., Nirvana Transport, Inc., Nirvana Warehousing, Inc. and Millers Wood Development Corp., as debtors and debtors in possession (collectively, the “Debtors”), having moved for the entry of an Order, pursuant to 11 U.S.C. § 327(a), authorizing the retention and employment of Keen-Summit Capital Partners LLC (“Keen-Summit”) as the business broker to the Debtors in the captioned chapter 11 cases;

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Nirvana, Inc. (5474), Nirvana Transport, Inc. (6503), Nirvana Warehousing, Inc. (2646) and Millers Wood Development Corp. (8040).

NOW, upon reading and filing the Order Reducing Time for Notice of Hearing to Consider Application for Entry of an Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors dated July 16, 2015, the Application for Entry of an Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors dated July 15, 2015 (the “Application”), the Affidavit of Harold J. Bordwin in Support of Application for Entry of an Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors, sworn to the 15th day of July, 2015 and the Affidavit of Mozafar Rafizadeh In Support of Chapter 11 Petition and First Day Motions, sworn to the 2nd day of June, 2015 in support of the relief requested; and upon reading and filing the Objection to Debtors’ Application for Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors dated July 20, 2015 filed on behalf of NBT Bank, National Association (“NBT”), the Response to Application to Retain Keen-Summit Capital Partners LLC as the Business Broker to the Debtors dated July 20, 2015 filed on behalf of New York Business Development Corporation (“NYBDC”) and Statewide Zone Capital Corporation of New York (“SZCC”), the Limited Objections of Northeast Bank (“NEB”) to Debtors’ Application to Retain and Employ Keen-Summit Capital Partners LLC as Their Business Broker dated July 20, 2015, the Objection to Application for Entry of an Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors dated July 20, 2015 filed on behalf of Comsource, Inc. (“Comsource”) and the United States Trustee’s Objection to Debtors’ Application for Entry of an Order Authorizing the Retention and Employment of Keen-Summit Capital Partners LLC as the Business Broker to the Debtors dated July 20, 2015 in opposition to the relief requested; and the Court having held a hearing concerning the Application on July 22, 2015 in Utica, New York

(the “Hearing”); and the Debtors having appeared by Bond, Schoeneck & King, PLLC (Stephen A. Donato, Esq. and Camille W. Hill, Esq., of counsel) in support of the relief requested; and appearances having been entered on behalf of NBT by Menter, Rudin & Trivelpiece, P.C. (Jeffrey A. Dove, Esq., of counsel), NYBDC and SZCC by Lemery Greisler LLC (Paul A. Levine, Esq., of counsel), NEB and the United States Department of Agriculture by Windels Marx Lane & Mittendorf, LLP (Mark A. Slama, Esq., of counsel), Comsource by Harris Beach PLLC (Lee E. Woodard, Esq., of counsel), the United States Small Business Administration by Nancy L. Caple, Esq., the Town of Boonville by James Moseman, Esq., the Official Committee of Unsecured Creditors by Lowenstein Sandler LLP (Nicole Stefanelli, Esq., of counsel) and the Office of the United States Trustee by Guy A. Van Baalen, Esq. and Erin P. Champion, Esq.; and the objections to the relief requested having been consensually resolved by the parties; and upon the record made at the Hearing; and the Court finding that (i) it has jurisdiction over the matters raised in the Application pursuant to 28 U.S.C. § 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) the relief requested in the Application is in the best interest of the Debtors’ estates, their creditors, and other parties in interest; and after due deliberation and cause appearing therefor; it is hereby

ORDERED, that the Application² is granted as set forth herein; and it is further

ORDERED, that all objections to the Application or the relief requested therein that have not been made, withdrawn, waived or settled, and all reservations of rights included therein, are overruled on the merits; and it is further

ORDERED, that the Debtors are authorized, pursuant to section 327(a) of the Bankruptcy Code (with compensation subject to the standard of review of section 328(a) of the

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Application or the Amended Retention Agreement dated July 23, 2015, as applicable.

Bankruptcy Code), to engage Keen-Summit as their business broker in the above-captioned Chapter 11 Cases, upon the terms and for the purposes set forth in the Application and in that certain Amended Retention Agreement dated July 23, 2015 attached hereto **Exhibit A** (the "Amended Agreement"), the terms of which are reasonable and are hereby approved in their entirety; and it is further

ORDERED, that, at the closing of a Transaction, the amount of the Transaction Fee and expense reimbursement due Keen-Summit, if any, shall be paid to the Debtors' counsel, Bond, Schoeneck & King, PLLC from the first proceeds of each Transaction, in full, simultaneously with the closing or other consummation of the Transaction before any funds are disbursed to the Secured Creditors and shall be held in escrow for the benefit of Keen-Summit pending the approval of a final professional fee application to be submitted on behalf of Keen-Summit; and it is further

ORDERED, that, if a Secured Creditor is the Successful Bidder for an Asset by means of a credit bid, and there are no other sources of cash available from other Successful Bids to fund the Keen-Summit expense reimbursement, the entry of an order approving the credit bid shall be contingent upon the funding of the Keen-Summit expense reimbursement. Nothing herein shall prejudice the right of a Secured Creditor to seek contribution regarding the expense reimbursement from other Secured Creditors; and it is further

ORDERED, that the Transaction Fee and expense reimbursement due Keen-Summit (including the portions thereof allocable to a sale of less than all of the assets) shall be treated as administrative expense claims in the Debtors' bankruptcy cases, but with respect to a sale of less than all of the assets, only the allocable share of the Transaction Fee and expense reimbursement attributable to that sale shall be chargeable against the proceeds of the assets sold; and it is further

ORDERED, that none of the fees payable to Keen-Summit hereunder shall constitute a “bonus” under applicable law; and it is further

ORDERED, that Keen-Summit is exempt from all requirements to keep time records in connection with its retention in the Debtors’ cases; and it is further

ORDERED, that notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, this Order shall be effective and enforceable immediately upon its entry. Any subsequent modification or vacatur of this Order shall not invalidate or impair any actions taken pursuant to this Order prior to such modification or vacatur; and it is further

ORDERED, that, with the exception of discussing (i) any matter with other Secured Creditors, (ii) the sale of the Secured Creditor’s own secured claim, note or security interest to a third party, or (iii) financing arrangements with a prospective counter-party to a Transaction, each and every Secured Creditor is directed not to initiate or engage in discussions with a prospective counterparty to a Transaction, but to forward and direct to Keen-Summit all such communications from or with prospective counterparties to a Transaction; and it is further

ORDERED, that the Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Application; and it is further

ORDERED, that the Court has and shall retain core jurisdiction to hear and determine all matters arising from or related to the implementation of this Order and neither the Debtors nor Keen-Summit shall be required to seek authorization from any other jurisdiction with respect to the relief granted by this Order.

#

EXHIBIT F



Order Filed on June 10, 2015
by Clerk
U.S. Bankruptcy Court
District of New Jersey

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

Caption in Compliance with D.N.J. LBR 9004-2(c)

WASSERMAN, JURISTA & STOLZ, P.C.

225 Millburn Avenue - Suite 207

P.O. Box 1029

Millburn, New Jersey 07041

Phone: (973) 467-2700

Fax: (973) 467-8126

Counsel for Donald V. Biase, Chapter 11

Trustee

DANIEL M. STOLZ

In Re:

BAYWAY HAND CAR WASH CORP., et als.

Debtors.

Case No.: 13-32632(MBK)

Jointly Administered

Hon. Michael B. Kaplan

Chapter: 11

Recommended Local Form: ☐ Followed ☒ Modified

**ORDER AUTHORIZING RETENTION OF
KEEN-SUMMIT CAPITAL PARTNERS, LLC AS
ADVISOR TO THE CHAPTER 11 TRUSTEE**

The relief set forth on the following pages, numbered two (2), is hereby **ORDERED**.

DATED: June 10, 2015

A handwritten signature of Michael B. Kaplan in black ink, written over a horizontal line.
Honorable Michael B. Kaplan
United States Bankruptcy Judge

Code). None of the fees payable to Keen-Summit hereunder shall constitute a “bonus” under applicable law.

3. Keen-Summit is exempt from the requirement to keep time records (unless Keen-Summit services are being billed by the hour) and the necessity of filing a fee application.
4. Keen-Summit’s fees and expenses shall be treated as administrative expense claims in the Company’s bankruptcy case.
5. Keen-Summit’s fees and expenses shall be entitled to a carve-out for payment pursuant to Section 506(c) of the Bankruptcy Code.
6. The terms and conditions of this Agreement are “reasonable.” If the Order authorizing the employment of Keen-Summit is obtained, Company shall pay all fees and expenses as promptly as possible in accordance with the terms of this Agreement and the Order without the need for further application to or order of the Bankruptcy Court.
7. Bankruptcy Court has and shall retain core jurisdiction to hear and determine all matters arising from the implementation of this Agreement, and neither the Company nor Keen-Summit shall be required to seek authorization from any other jurisdiction with respect to the relief granted by the Order approving this Agreement.
8. The effective date of the retention is the date the Application was filed with the Court.

EXHIBIT G

FILED

MAR 11 2015

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

United States Bankruptcy Court
Columbia, South Carolina

In re:

Case No. 15-00712

Briar's Creek Golf, LLC d/b/a
The Golf Club at Briar's Creek,

Chapter 11

Debtor.

**ORDER AUTHORIZING EMPLOYMENT OF KEEN-SUMMIT CAPITAL PARTNERS
LLC AS REAL ESTATE ADVISOR FOR THE DEBTOR, EFFECTIVE FEBRUARY 26,
2015, AND APPROVING PAYMENT OF FEES TO KEEN-SUMMIT**

Upon the application (the "Application") of Briar's Creek Golf, LLC d/b/a The Golf Club at Briar's Creek ("Debtor"), for an order pursuant to sections 327(a) and 328(a) of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), authorizing them to retain Keen-Summit Capital Partners LLC ("Keen-Summit") as financial advisor effective as of February 26, 2015 upon the terms of the Application and the Engagement Letter attached to the Application as Exhibit A (the "Engagement Letter"). Due and adequate notice of the Application having been given; it appearing that no other notice need be given; it further appearing that Keen-Summit is not representing any adverse interests in connection with these cases; and it appearing that the relief requested in the Application is in the best interest of the Debtor; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED that the Application be, and it hereby is, granted upon the terms set forth in the Application and the Engagement Letter, as set forth or amended herein; and it is further

ORDERED that the capitalized terms not defined herein shall have the meanings ascribed to them in the Application or the Engagement Letter; and it is further

ORDERED that to the extent of any inconsistency between the application, the affidavit, the engagement letter, and this order, the terms of this order shall govern.

ORDERED that in accordance with section 327(a) of the Bankruptcy Code, the Debtor is authorized to employ and retain Keen-Summit as of February 26, 2015 as its real estate advisor to market the Debtor's assets and seek higher or otherwise better bids as set forth in the Engagement Letter and the Application; and it is further

ORDERED that, as set forth in the Application, the Debtor is authorized to pay Keen-Summit its Engagement Fee. Keen-Summit shall only be reimbursed for expenses after consideration of a fee application for approval of such expenses; and it is further

ORDERED that the Engagement Fee and reimbursement of Keen-Summit's expenses shall be subject to review in a final fee application pursuant to the standards set forth in sections 330 and 331 of the Bankruptcy Code; and it is further

ORDERED that, as set forth in the Application, the Transactional Fee of 17.5% (the "Transactional Fee") of the amount by which the eventual gross sale proceeds exceed the current proposed purchase price of \$11,300,000 (as more fully described in the Debtor's sale motion filed with the Court on February 10, 2015), if any, will be considered earned and shall be paid in full, off the top, from the gross sale proceeds simultaneous with closing or other consummation of a sale transaction, subject to Bankruptcy Court approval of Keen-Summit's final fee application; and it is further

ORDERED that the Transactional Fee, if any, shall be subject to the standard of review provided in section 328(a) of the Bankruptcy Code and shall not be evaluated under any other standard of review, including the standard set forth in section 330 of the Bankruptcy Code; and it is further

ORDERED that, the Transactional Fee, if any, will be considered earned and shall be paid in full, off the top, from the gross sale proceeds simultaneous with a sale closing or other consummation of a sale transaction; and it is further

ORDERED that Keen-Summit shall be compensated for its services as set forth above, and Keen-Summit shall be required to file a final fee application with this Court for review and approval of its compensation in this matter; and it is further

ORDERED that the Debtor is authorized to promptly, directly pay, or advance to Keen-Summit as necessary, the estimated \$17,500 in third-party advertising and marketing expenses relating to Keen-Summit's Marketing Budget. Any marketing expenses advanced by the Debtor shall be subject to Bankruptcy Court review and approval upon the filing of a final fee application; and it is further

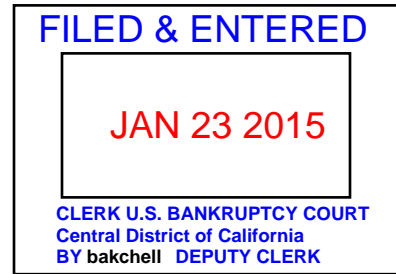
ORDERED that the indemnification provisions set forth in the Engagement Letter are approved, provided however, that notwithstanding anything to the contrary:

John E. Wailes 3/11/15
John E. Wailes
U.S. Bankruptcy Court Judge
District of South Carolina
Date

EXHIBIT H

Ashley M. McDow (245114)
Michael T. Delaney (261714)
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025-0509
Telephone: 310.820.8800
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Email: amcdow@bakerlaw.com
mdelaney@bakerlaw.com

Attorneys for Debtor and Debtor in Possession,
SARKIS INVESTMENTS COMPANY, LLC



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re
SARKIS INVESTMENTS COMPANY, LLC,
Debtor and Debtor in Possession.

Case No.: 2:13-bk-29180-RK

Chapter 11

**ORDER GRANTING DEBTOR'S
APPLICATION TO EMPLOY GA KEEN
REALTY ADVISORS, LLC AS REAL
ESTATE BROKER**

[No Hearing Required – LBR 9013-1(o)]

On or about April 15, 2014, Sarkis Investments Company, LLC (“Sarkis” or the “Debtor”) filed the amended *Application to Employ GA Keen Realty Advisors, LLC as Real Estate Broker* (the “Application”) [Docket Entry 184] pursuant to the Retention Agreement dated April 15, 2014 (the “Retention Agreement”). Thereafter, on or about April 28, 2014, secured creditor MSCI 2007-IQ13 Ontario Retail Limited Partnership (“MSCI”) filed its *Objection to Debtor’s Amended Application [Docket No. 184] to Employ GA Keen Realty Advisors, LLC As Real Estate Advisor* (the “Objection”) [Docket Entry 189].

On or about December 5, 2014, Sarkis, MSCI, and GA Keen Realty Advisors, LLC (“GA Keen” and, collectively with Sarkis and MSCI, the “Parties”) entered into the *Stipulation Regarding the Employment of GA Keen Realty Advisors, LLC as Real Estate Broker for the Estate* (the “Stipulation”) [Docket Entry 240]. By and through the Stipulation, the Parties

1 resolved the Objection to the Application by agreeing to extend the exclusivity period and
2 clarifying the treatment of any claim arising under the indemnity provision of the Retention
3 Agreement. On or about December 8, 2014, this Court entered an order approving the Stipulation
4 [Docket Entry 242]. Thereafter, on or about December 18, 2014, MSCI withdrew the Objection
5 [Docket Entry 250] and filed a Notice of Non-Opposition with respect to the Application [Docket
6 Entry 246].

7 Having considered the Application, Stipulation and Retention Agreement, receiving no
8 objection to the Application or retention of GA Keen pursuant to the Retention Agreement as
9 modified by the Stipulation, finding notice of the Application due and proper and in accordance
10 with all applicable rules, and good cause appearing therefor

11 **IT IS HEREBY ORDERED** that the Application is GRANTED;

12 **IT IS FURTHER ORDERED** that pursuant to 11 U.S.C. §§ 327(a) and 328, the Debtor
13 is hereby authorized to retain GA Keen as its real estate broker to act as an agent to the Debtor in
14 the Debtor's capacity as debtor in possession, effective April 15, 2014, on the terms set forth in
15 the Retention Agreement, as modified by the Stipulation;

16 **IT IS FURTHER ORDERED** that GA Keen shall be compensated and reimbursed for
17 its out-of-pocket expenses in accordance with paragraph III of the Retention Agreement;

18 **IT IS FURTHER ORDERED** that the Debtor is authorized to pay GA Keen a marketing
19 advance of Twenty-Seven Thousand Dollars (\$27,000.00) pursuant to paragraph III.A of the
20 Retention Agreement without further order of this Court;

21 **IT IS FURTHER ORDERED** that each Transaction Fee (as defined in paragraph II.C.1)
22 earned pursuant to the terms of the Retention Agreement shall be presented to the Court for
23 approval simultaneous with the request for the Court's approval of the Transaction itself, and GA
24 Keen shall not be required to seek approval of the Transaction Fees via an interim or final fee
25 application;

26 **IT IS FURTHER ORDERED** that, notwithstanding the preceding paragraph and
27 excluding fees for which GA Keen seeks to be paid by the hour, if any, the compensation and
28 expense reimbursement payable to GA Keen pursuant to the Retention Agreement and this Order

1 shall be subject to review only pursuant to the standard set forth in §328(a) of the Bankruptcy
2 Code;

3 **IT IS FURTHER ORDERED** that this Court has and shall retain jurisdiction with
4 respect to all matters arising from or related to the implementation of this Order and neither the
5 Debtor nor GA Keen shall be required to seek authorization from any other jurisdiction with
6 respect to the relief granted by this Order;

7 **IT IS FURTHER ORDERED** that the Debtor is authorized to take any and all steps
8 necessary to effectuate this Order, the Retention Agreement, and/or the Stipulation;

9 **IT IS FURTHER ORDERED** that the terms and conditions of GA Keen's engagement
10 are deemed "reasonable" and none of the fees payable to GA Keen hereunder shall constitute a
11 "bonus" under applicable law; and

12 **IT IS FURTHER ORDERED** that GA Keen is exempt from the requirement to keep
13 time records (unless Keen's services are being billed by the hour.

14 **IT IS SO ORDERED.**

15 ###

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24 Date: January 23, 2015



25 Robert Kwan
26 United States Bankruptcy Judge
27
28

EXHIBIT I



ENTERED
12/18/2014

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

| | | |
|----------------------------------|---|-------------------|
| In re: | § | |
| | § | Case No. 14-70427 |
| AZIZ CONVENIENCE STORES, L.L.C., | § | |
| | § | Chapter 11 |
| Debtor. | § | |

**AGREED ORDER AUTHORIZING THE EMPLOYMENT OF GA KEEN REALTY
ADVISORS, LLC, AS INVESTMENT BANKER FOR THE DEBTOR,
PURSUANT TO §§105(a), 327(a) AND 328(a) OF THE BANKRUPTCY CODE**

CAME ON FOR CONSIDERATION Aziz Convenience Stores, L.L.C., Debtor and Debtor-in-Possession's Motion for Order Pursuant to §§105(a), 327(a) and 328(a) of the Authorizing the Employment of GA Keen Realty Advisors, LLC ("Keen") as Investment Banker for the Debtor (the "Application").¹ The Court having been satisfied that Keen does not hold or represent an interest adverse to the Debtor's estate and that Keen is a "disinterested person" as that term is defined by the Bankruptcy Code; and due and proper notice of the Application having been given; and it appearing that no other or further notice of the Application is required; and it appearing this Court has jurisdiction to consider the Application; and it appearing that the relief requested in the Application and provided for herein is in the best interest of the Debtor, its estate and creditors; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED that the Application is GRANTED; it is further

ORDERED that the pursuant to §§327(a) and 328 of the Bankruptcy Code, the Debtor is hereby authorized to retain Keen as its investment banker, effective November 25, 2014, on the terms set forth in the Agreement, as modified by this Order; it is further

¹ All capitalized words not defined herein are ascribed the same meaning given to them in the Motion.

ORDERED that the Agreement is hereby modified as follows:

- i. The term of the Agreement may be extended, as provided in paragraph IV of the Agreement, by the mutual consent of the parties only if PlainsCapital Bank ("PCB") consents or by further order of this Court.
- ii. The term "Properties" as used in the Agreement shall refer to the list of properties contained on Exhibit A to this Order.
- iii. Before incurring any expenses in excess of \$2,500 that are not included in the marketing budget approved by the Debtor and presented to the Court as an exhibit at the hearing on the Application, Keen shall obtain approval of both the Debtor and PCB. Keen shall provide the Debtor and PCB with a reconciliation of the budget compared to the actual expenses incurred on no less than a monthly basis.
- iv. Keen shall provide directly to PCB, with a copy to Debtor's counsel, all final marketing materials. In addition, every two weeks, Keen shall provide directly to PCB, with a copy to Debtor's counsel, a marketing summary setting out all marketing activities that took place in the prior two week period.

ORDERED that Keen shall be compensated and reimbursed for its out-of-pocket expenses in accordance with the terms and conditions of the Retention Agreement without the need to file interim fee applications; it is further

ORDERED that each Sale Fee or Financing Fee earned pursuant to the terms of the Agreement shall be presented to the Court for approval simultaneous with the request for the Court's approval of the Transaction itself, and Keen shall not be required to seek approval of such fee via interim fee application prior to payment by the Debtor; it is further

ORDERED that the Foreclosure/Credit-Bid Fee shall be an ordinary administrative expense of the Debtor's estate and shall not be imposed against PCB, its claims, or its collateral under §§ 506(c) or 552 of the Bankruptcy Code; it is further

ORDERED that at the conclusion of this case, Keen will seek final approval of all Sale Fees, Financing Fees and expenses paid during the case through a final fee application. In addition, to the extent Keen is due any additional fees not previously paid during the case, it shall seek payment of such fees in its final fee application. Keen's application for final allowance of

compensation and reimbursement of expenses incurred in connection with the services performed for the Debtor in the instant chapter 11 case will be filed and heard pursuant to the Bankruptcy Code, the Bankruptcy rules, the Local Rules and any applicable orders of this Court; it is further

ORDERED that, notwithstanding the preceding paragraph and excluding fees for which Keen seeks to be paid by the hour, if any, the compensation and expense reimbursement payable to Keen pursuant to the Agreement and this Order shall be subject to review only pursuant to the standard set forth in §328(a) of the Bankruptcy Code; it is further

ORDERED that this Court has and shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order and neither the Debtor nor Keen shall be required to seek authorization from any other jurisdiction with respect to the relief granted by this Order; it is further

ORDERED that the Debtor is authorized to take any and all steps necessary to effectuate this Order; it is further

ORDERED that the terms and conditions of Keen's engagement are deemed "reasonable" and none of the fees payable to Keen hereunder shall constitute a "bonus" under applicable law; it is further

ORDERED that Keen is exempt from the requirement to keep time records (unless Keen's services are being billed by the hour); it is further

ORDERED that notwithstanding anything in the Agreement or this Order to the contrary, all parties in interest, including the Debtor, reserve the right to ask this Court to terminate the Agreement for cause; it is further

ORDERED that, to the extent the provisions contained in this Order conflict with or are inconsistent with the provisions of Stipulation and Agreed Final Order Authorizing the Debtor's Use of Cash Collateral [Docket No.] (the "Cash Collateral Order"), the Cash Collateral controls; and it is further

ORDERED that, notwithstanding any terms to the contrary in the Agreement or this Order and unless Greenwich in writing agrees otherwise in its sole and absolute discretion, Greenwich shall not be required to pay Keen any fee or other consideration under any of the following circumstances: the obligations owed to Greenwich and secured by liens against The 200 Acres are not satisfied in full; Greenwich is the successful purchaser through credit bids at an auction of The 200 Acres; or Greenwich forecloses on The 200 Acres.

SIGNED this 18th day of December, 2014.


THE HONORABLE RICHARD S. SCHMIDT
UNITED STATES BANKRUPTCY JUDGE

AGREED:

OKIN & ADAMS LLP

By: /s/ Matthew S. Okin

Matthew S. Okin

Texas Bar No. 00784695

Email: mokin@okinadams.com

George Niño

Texas Bar No. 00786456

1113 Vine St. Suite 201

Houston, TX 77002

Tel: (713) 228-4100

Fax: (888) 865-2118

**COUNSEL FOR AZIZ CONVENIENCE
STORES, L.L.C., PLAINTIFF, DEBTOR AND
DEBTOR-IN-POSSESSION**

WALKER & TWENHAFEL, L.L.P.

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EXHIBIT J

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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| In re: | : |
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| COLDWATER CREEK INC., et al.,¹ | : |
| | : |
| Debtors. | : |
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Chapter 11
Case No. 14-10867 (BLS)
(Jointly Administered)
Ref. Docket No. 406

**ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF
GA KEEN REALTY ADVISORS, LLC AS REAL ESTATE ADVISOR
TO THE DEBTORS *NUNC PRO TUNC* TO THE
DATE OF THE RETENTION AGREEMENT**

Upon the application (the "**Application**")² of Coldwater Creek Inc., on behalf of itself and its affiliated debtors and debtors in possession in the above-captioned cases (collectively, the "**Debtors**"), for an order (this "**Order**") authorizing the Debtors to retain and employ GA Keen Realty, LLC ("**GA Keen Realty**"), as real estate advisor to the Debtors effective as of the date of the Retention Agreement; and upon the consideration of the Mark P. Naughton Declaration attached to the Application as Exhibit A; and it appearing that this Court has jurisdiction to consider the Application pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and it appearing that venue of these chapter 11 cases and the Application in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this

¹ The Debtors in these proceedings (including the last four digits of their respective taxpayer identification numbers) are: Coldwater Creek Inc. (9266), Coldwater Creek U.S. Inc. (8831), Aspenwood Advertising, Inc. (7427), Coldwater Creek The Spa Inc. (7592), CWC Rewards Inc. (5382), Coldwater Creek Merchandising & Logistics Inc. (3904) and Coldwater Creek Sourcing Inc. (8530). Debtor CWC Sourcing LLC has the following Idaho organizational identification number: W38677. The Debtors' corporate headquarters is located at One Coldwater Creek Drive, Sandpoint, Idaho 83864.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Application.

Court having determined that GA Keen Realty is a “disinterested person,” as defined in section 101(14) of the Bankruptcy Code and as required by section 327(a) of the Bankruptcy Code; and this Court having further determined that the relief requested in the Application is in the best interests of the Debtors, their estates, their creditors, and other parties-in-interest; and it appearing that proper and adequate notice of the Application has been given and that, except as otherwise ordered herein, no other or further notice is necessary; and after due deliberation thereon; and good and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Application is GRANTED as set forth herein.
2. In accordance with sections 327(a) and 328(a) of the Bankruptcy Code, Bankruptcy Rules 2014 and 2016, and Local Rules 2014-1 and 2016-2, the Debtors are authorized to employ and retain GA Keen Realty in accordance with the terms and conditions set forth in the Application and the Retention Agreement, as modified herein, effective as of the date of the Retention Agreement. The terms and conditions of the Retention Agreement are reasonable.
3. The Debtors are authorized to employ GA Keen Realty to act as an agent to the Debtors to advertise, market, negotiate and coordinate the closing of the sale of the Debtors’ interests in the Leases; provided, however, that if GA Keen Realty is subsequently authorized to market the Debtors’ lease with the Wood County Development Authority (“WCDA”), as more fully described in the WCDA’s limited objection [Docket No. 452], GA Keen Realty agrees to communicate with the WCDA about the identity of potential prospects interested in the lease and to reasonably cooperate with the WCDA in marketing the lease.

4. The structure of the Transaction Fee and Reduction Fee are approved pursuant to section 328(a) of the Bankruptcy Code and shall not be evaluated under the reasonableness standard set forth in section 330 of the Bankruptcy Code; provided that the Transaction Fee and Reduction Fee are subject to this Court's approval of a final fee application. For the avoidance of doubt, nothing in this Order is pre-approving the overall amounts of fees and expenses payable to GA Keen Realty, and the U.S. Trustee's right to object to (i) fees that do not appear to meet the terms of employment set forth in the Retention Agreement approved hereunder and (ii) expenses that do not appear to be actual and necessary is fully reserved.

5. GA Keen Realty shall file fee applications for interim and final allowance of reimbursement of Consulting Fees and expenses pursuant to the procedures set forth in the Retention Agreement, sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and any other applicable procedures and orders of this Court; *provided* that the United States Trustee for the District of Delaware shall have the right to object to GA Keen Realty's Consulting Fees and expenses based on the reasonableness standard set forth in section 330 of the Bankruptcy Code.

6. None of the fees payable to GA Keen Realty shall constitute a "bonus" or fee enhancement under applicable law.

7. Notwithstanding anything to the contrary in the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, orders of this Court or any guidelines regarding submission and approval of fee applications, in light of services to be provided by GA Keen Realty and the structure of GA Keen Realty's compensation pursuant to the Retention Agreement, GA Keen Realty and its professionals shall be excused from maintaining time records as set forth in Local

Rule 2016-2 and the United States Trustee Fee Guidelines in connection with the services to be rendered pursuant to the Retention Agreement; *provided, however*, for Consulting Fees charged on an hourly basis, GA Keen Realty will maintain records of its services rendered to the Debtors in one tenth-hour increments, including reasonably detailed descriptions of those services and the individuals who provided those services, and will present such records to this Court.

8. All of GA Keen Realty's fees and expenses shall be treated as administrative expense claims in the Debtors' chapter 11 cases.

9. Notwithstanding any provision in the Application and Retention Agreement to the contrary, the Debtors are authorized to indemnify and hold harmless GA Keen Realty and its respective directors, officers, employees, agents, representatives, and controlling persons (collectively, the "**Indemnified Parties**"), pursuant to the terms and conditions set forth in the Retention Agreement, subject to the following conditions:

- (a) the Indemnified Parties shall not be entitled to indemnification, contribution, or reimbursement for services other than the services provided under the Retention Agreement, unless such services and the indemnification, contribution, or reimbursement therefor are provided for in the Retention Agreement and approved by this Court;
- (b) notwithstanding anything to the contrary in the Retention Agreement, the Debtors shall have no obligation to indemnify any person, or provide contribution or reimbursement to an Indemnified Party, for any claim or expense that is: (i) judicially determined (the determination having become final and no longer subject to appeal) to have arisen from an Indemnified Party's gross negligence or willful misconduct; (ii) for a contractual dispute in which the Debtors alleges the breach of an Indemnified Party's contractual obligations unless this Court determines that indemnification, contribution, or reimbursement would be permissible pursuant to *In re United Artists Theatre Co.*, 315 F.3d 217 (3d Cir. 2003); or (iii) settled prior to a judicial determination as to the exclusions set forth in clauses (i) and (ii), but determined by this Court, after notice and a hearing, to be a claim or expense for which an Indemnified Party should not receive indemnity, contribution, or reimbursement under the terms of the Retention Agreement as modified by this Order;

- (c) if, during the pendency of these Chapter 11 Cases, the indemnification provided in Schedule B of the Retention Agreement is held unenforceable by reason of the exclusions set forth in subparagraph (b) above and GA Keen Realty makes a claim for the payment of any amounts by the Debtors on account of the Debtors' contribution obligations, then the limitations on GA Keen Realty's obligations shall not apply; and
- (d) if, before the earlier of (i) the entry of an order confirming a chapter 11 plan in these cases (that order having become a final order no longer subject to appeal) and (ii) the entry of an order closing these cases, an Indemnified Party believes that it is entitled to the payment of any amounts by the Debtors on account of the Debtors' indemnification, contribution, or reimbursement obligations under the Retention Agreement, including without limitation the advancement of defense costs, the Indemnified Party must file an application before this Court, and the Debtors may not pay any such amounts to the Indemnified Party before the entry of an order by this Court approving the payment. This subparagraph (c) is intended only to specify the period of time under which this Court shall have jurisdiction over any request for payment by an Indemnified Party for indemnification, contribution, or reimbursement, and not a provision limiting the duration of the Debtors' obligation to indemnify the Indemnified Parties.

10. Notwithstanding anything to the contrary in the Retention Agreement, Great American Group, LLC shall not be considered an Indemnified Party.


11. Notwithstanding anything to the contrary in the Retention Agreement, during the course of these chapter 11 cases, GA Keen Realty shall have whatever fiduciary duty is imposed upon it by applicable law.

12. To the extent there is any inconsistency between the terms of the Retention Agreement, the Application and this Order, the terms of this Order shall govern.

13. The Debtors are authorized, empowered, and directed to take all actions necessary to implement the relief granted pursuant to this Order.

14. During the pendency of these chapter 11 cases, this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order and neither the Debtors nor GA Keen shall be required to seek authorization from any other jurisdiction with respect to the relief granted by this Order.

Dated: Wilmington, Delaware
June 12, 2014



BRENDAN LINEHAN SHANNON
UNITED STATES BANKRUPTCY JUDGE